CLERK'S COPY

Certificate and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 72

B. K. ISAACS, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT,

vs.

HOBBS TIE & TIMBER COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE FILED APRIL 5, 1930

RECORD FILED MAY 19, 1930

(34,926)

(34,926)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1930

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IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

MARCH TERM, A. D. 1930

No. 8584

B. K. ISAACS, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, Appellant,

vs.

HOBBS TIE & TIMBER COMPANY, a Corporation, Appellee.

Appeal from the District Court of the United States for the Western District of Arkansas

CERTIFICATE FILED MAR. 24, 1930

The United States Circuit Court of Appeals for the Eighth Circuit certifies that a record on an appeal in the above case, now pending in such court, discloses the following:

The estate of Henrietta E. Cunningham is being administered in the bankruptcy court of the Northern District of Texas and B. K. Isaacs is the trustee therein. The estate includes a large acreage of timber land located entirely within the Western Judicial District of Arkansas. The indebtedness being in default, the holder of notes secured by a mortgage upon such land filed a foreclosure proceeding in the proper State court. The petition therein named the bankrupt and the trustee as defendants and stated that the bankruptcy proceeding was in course in the Texas District and that the land had been conveyed by the bankrupt to the trustee. The petition contained the usual allegations in a foreclosure suit and also that the secured note had not been filed as a claim in the bankruptcy proceeding. The above defendants, specially appearing, removed the proceeding to the District Court for the Western District of Arkansas. The trustee answered, alleging (among other things) his right and title as trustee; that, for lack of in-

formation, the execution of the note and mortgage and the payments thereon were not admitted nor denied; that plaintiff is the owner of the note; "that the property hereinbefore described was duly listed as an asset of the estate of the bankrupt in said bankruptcy proceeding in the Northern District of Texas in the schedules filed by the bankrupts therein on the 20th day of August, 1920, and upon his appointment and qualification as aforesaid, the defendant entered into possession of said premises and since that time, and at the present time, he has been in lawful and peaceable possession thereof as trustee in bankruptcy aforesaid"; that the bankrupts are insolvent; that the indebtedness against the bankrupts exceeded $350,000.00; that the unsecured creditors had filed claims which had been allowed in excess of $250,000.00; that there is located on the lands involved in excess of twenty-five million feet of uncut hard-[fol. 2] wood timber; that the reasonable value of the property, including the timber and an abandoned railroad thereon is in excess of $125,000.00, which leaves an equity for the benefit of the general creditors over and above the claim of the plaintiff of more than $60,000.00; that if the mortgage be foreclosed and the property sold otherwise than in due course of administration by the court of bankruptcy it would result in great loss and detriment to the general creditors of the estate and seriously embarrass and impede the due and proper administration of the estates of the bankrupts; "that he has not in the short time intervening since his appointment and qualification been able to fully search out and learn all of the facts pertaining to the lands in question that it is necessary for him to know in order to properly administer said estates. In this connection the defendant is informed and believes, and upon such information and belief alleges the fact to be, that at the present time the general economic conditions prevailing in the lumber industry are such that it is impossible and impracticable to sell said property, and a sale thereof at this time would result in the sacrifice thereof for an amount greatly under its real value under ordinary conditions. That it is in fact advisable and to the best interest of said estates that the defendant be given time and opportunity to dispose of said property at private sale in due course of administration of said bankrupt estates after he has obtained accurate

knowledge of the amount, quality and value of the timber thereon and after he has the opportunity of putting the property on the market"; that neither the trustee nor the court conducting the bankruptcy had consented to foreclosure of the mortgage and that the District Court for the Northern District of Texas had "exclusive jurisdiction to ascertain the facts and administer said property." The answer concludes as follows:

"By reason of the foregoing facts, the property in question being in the custody and possession of the defendant, as trustee in bankruptcy in the District Court of the United States for the Northern District of Texas, this Honorable Court can proceed no further herein than to pass upon the validity of the alleged mortgage lien of the plaintiff and the rights and interest of the other defendants herein in the premises and fix the amount of the plaintiff's indebtedness against said property. This Honorable Court has no power, jurisdiction or authority by reason of the premises, to administer upon said property by determining when the same shall be sold, how the same shall be sold or to order a sale thereof, these matters being soley and exclusively matters of administration for the District Court of the United States for the Northern District of Texas, at Fort Worth, sitting in bankruptcy.

Wherefore, this defendant prays that upon hearing hereof the court establish and fix the lien claims and interest of the plaintiff and of the various defendants herein and thereupon proceed no further with this suit; that the prayer of the plaintiff, that said property be ordered sold, and sold, be in all things denied and that this defendant go hence without day without costs."

By an amendment to the answer, the trustee pleaded that the referee in bankruptcy of the Northern District of Texas had made an order, about three months prior to filing of the foreclosure proceedings, "authorizing and directing this defendant to offer for sale and sell all, or any part, of the estates of the bankrupt aforesaid, at public or private sale, for cash, or on terms, and subject to or free of liens". So far as this record shows, no action toward sale of this land had been taken by the trustee up to the entry of this decree, about six months after the above order of the referee.

[fol. 3] A motion to strike out "all that part of the answer * * * which seeks to delay judgment and sale" and for judgment on the pleadings was sustained and a decree of foreclosure and sale was entered, which (among other things) provided that "if there be a surplus over and above the amount to pay said judgment, interest and costs, that the same be turned over after all expenses have been paid, to the said B. K. Isaacs as trustee in bankruptcy for the estate of the said Henrietta E. Cunningham."

It is further certified that the following question of law arises from the record and is presented, the decision of which is indispensable to a determination of the case. To the end that this Court may properly discharge its duty, it desires the instruction of the Supreme Court upon it:

Question 1. After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale by the truste, of all of the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?

Kimbough Stone, United States Circuit Judge.
Wilbur F. Booth, United States Circuit Judge.
Archibald K. Gardner, United States Circuit Judge.

[File endorsement omitted.]

[fols. 4 & 5] Certificate to foregoing paper omitted in printing.

[fol. 6] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on W. N. Ivie, filed April 10, 1921, omitted in printing.

[fol. 2] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS

WRIT OF ERROR AND CLERK'S RETURN—Filed April 10, 1929

UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court, before you, or some of you, between B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, Appellant, and Hobbs Tie & Timber Company, a corporation, Appellee, a manifest error hath happened, to the great damage of the said B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, Appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the same at Saint Louis, Missouri, in not exceeding thirty days from 10th day of April, 1929, being the date of issuance of the citation herein, in the United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred twenty-nine.

Wm. S. Wellshear, Clerk of the District Court of the United States, Western District of Arkansas.
(Seal U. S. Dist. Court, West. Dist. Ark.)

Allowed by Frank A. Youmans, United States District Judge.

[fol. 3] Return to Writ

UNITED STATES OF AMERICA,
Western District of Arkansas, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said United States District Court, for the Western District of Arkansas, at office in the City of Fort Smith, Arkansas, this 12th day of April, A. D. 1929.

Wm. S. Wellshear, Clerk District Court of the United States, Western District of Arkansas. (Seal U. S. Dist. Court, West. Dist. of Ark.)

It is hereby certified that a copy of this writ is this day lodged in the Clerk's Office for the use of the appellee, the 10th day of April, 1929.

Wm. S. Wellshear, Clerk. (Seal U. S. Dist. Court, West. Dist. of Ark.)

[File endorsement omitted.]

[Caption omitted]

[fol. 4] In Chancery Court of Benton County

No. 5031

Home Fir & Timber Company, a Corporation, Plaintiff,

vs.

Bankers Trust Company, a Corporation; J. Ernest Tennyson, C. C. Binns, Henrietta E. Cunningham, T. P. Perkins and Wife; Mrs. T. P. Perkins; and B. K. Isaacs, as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Ft. Worth Division Thereof; and of the Estate of Henrietta E. Cunningham, a Bankrupt, Defendants

Complaint. Filed Dec. 12, 1928

Comes the plaintiff and for its cause of action and complaint, states, that it is a corporation organized and exist-

ing under the laws of the State of Delaware with its Principal place of business in the City of Wilmington in said state, and is admitted as a foreign corporation to do business in the State of Arkansas. That on the 27th day of September, 1921, J. L. Cunningham and wife Henrietta E. Cunningham, made, executed and delivered to the Holland Banking Company, at that time a banking corporation organized and existing under the laws of the State of Missouri with its principal place of business in the City of Springfield in said state, their promissory note in the sum of $76,000.00 due and payable on the first day of October, 1924, and with the interest thereon from date until paid at the rate of 7% per annum. A true copy of said note being hereto attached marked Exhibit "A" and made a part hereof.

Plaintiff states that on the same day and to secure said note at maturity the said J. L. Cunningham and wife, Henrietta E. Cunningham, made, executed and delivered to said Holland Banking Company their Mortgage Deed covering the following described lands located in Benton, Madison and Washington Counties, Arkansas, together with a certain line of railroad as fully described and set forth therein, together with all rails, ties, right of way and rolling stock thereon, said land and railroad being fully described and set forth as follows, to wit, and as contained in a deed of conveyance from J. L. Cunningham and wife, Henrietta E. Cunningham to T. P. Roberts, as follows:

[fol. 5] STATE OF TEXAS,
County of Palo Pinto, ss:

Know All Men By These Presents: That we, J. L. Cunningham and wife Henrietta C. Cunningham of the Palo Pinto in the state aforesaid, for and in consideration of the sum of Ten ($10.00) Dollars, to us in hand paid by T. P. Perkins, the receipt of which is hereby acknowledged, and confessed and this conveyance being subject to an incumbrance of Seventy-nine Thousand ($79,000.00) Dollars in favor of the Holland Banking Company of Springfield, Missouri and which mature October 1, 1924, secured by mortgage on the hereinafter described lands, have granted, sold and conveyed and by these presents do grant, sell and con-

vey unto the said T. P. Perkins of the County of Palo Pinto in the State of Texas, all these certain lots, tracts or parcels of land and consisting of about 12,560 acres more or less situated in the Counties of Benton, Madison, and Washington in the State of Arkansas, known as being part of the Blackburn tract, and about five miles of constructed tram railroad and about three miles of constructed dumps of road bed and right of way, all of which is more fully described and designated in that deed heretofore executed by the Trustees for the Bankers Trust Company, Inc., to Moard Tie and Timber Co. of date October 2, 1919 and of record in Volume 144 at pages 639 to 643 inclusive on the Deed Records of Benton County, Arkansas, described in detail as follows, to-wit:

(The detail description of lands here set out in the complaint is omitted from this transcript on appeal pursuant to paragraph 1 of the praecipe of counsel.)

To have and to hold the above described premises together with all and the singular the rights, and appurtenances thereto or in anywise belonging unto the said T. P. Perkins his heirs and assigns forever and we hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend, all and singular the title to said lands and premises unto the said T. P. Perkins, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, and I, Henrietta E. Cunningham, wife of the said J. L. Cunningham do hereby release and relinquish all my rights and title of homestead and dowery in all the lands and premises herein.

Witness our hands at Mineral Wells, Texas this the 18th day of April, 1924.

J. L. Cunningham, Henrietta E. Cunningham.

[fol. 6] State of Texas,
County of Palo Pinto, ss:

Be it remembered, that on this day came before me the undersigned, Mindon York, Notary Public within and for the county aforesaid duly commissioned and acting J. L. Cunningham, to me well known as the grantor in the foregoing deed, and stated that he had executed the same for

the consideration and purposes therein mentioned and set forth.

And on the same day also voluntarily appeared before me, Henrietta E. Cunningham, wife of the said J. L. Cunningham to me well known as the person signing said deed, and in the absence of her said husband, declared that she had of her own free will signed and sealed the relinquishment of dower and homestead in the foregoing deed expressed for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public on this 21st day of April, A. D. 1924.

Mindon York, Notary Public in and for Palo Pinto County, Texas.

Filed for record this the 31st day of January, 1925, at 8 o'clock, P. M. and recorded on the same day 1925.

D. Simpson, Recorder.

State of Arkansas,
County of Madison, ss:

I, Harold J. Brashears, Clerk of the Circuit and Chancery Court of the State and County aforesaid do hereby certify that the foregoing is a true and correct copy as taken from Deed Record No. 59 at page 248 of the Deed Records of Madison County, Arkansas.

Witness my hand and official seal this the 24th day of September, 1928.

Harold J. Brashears, Circuit Clerk. (Seal.)

Plaintiff states that on December 12, 1927, Towne Young and F. M. McDavid as Trustees for the Bankers Trust Company, a corporation of Dallas, Texas, became the owners of said lands, railroad and right of way and all property described, as above set forth, by virtue of sale from the Bankrupt Court of the United States in and for the Western [fol. 7] District of Arkansas and the Ft. Smith Division thereof, in the matter of the Ozark Land and Lumber Company, bankrupt, being No. 456 in Bankruptcy, wherein Perry N. Clark was Trustee and under and by orders of

said bankrupt court said property was sold by the said Perry N. Clark and the said Towne Young and F. M. McDavid became the purchasers thereof and received a deed from the said Perry N. Clark as such Trustee in Bankruptcy in and for the United States District Court, Western District of Arkansas and the Ft. Smith Division thereof. That thereafter the said Towne Young and F. M. McDavid as trustees for the Bankers Trust Company of Dallas, Texas, executed a certain Mortgage Deed in the sum of $16,670.00 on said lands, railroad and right of way to Holland Banking Company of Springfield, Missouri, which appears of record in Mortgage Record 65 at page 242, but that said Mortgage was thereafter satisfied, paid in full and the record thereof satisfied. That thereafter, on the 11th day of December, 1927, the said Towne Young and F. M. McDavid as Trustees for the Bankers Trust Company of Dallas, Texas, executed their Mortgage Deed to James D. Johnson, James H. Birch, Jr., Frank A. Potter, E. C. Smith, attorneys in fact and Trustees of D. L. Whitmore, J. H. Birch, H. G. McFadden, G. W. Carroll, F. C. Foster, James D. Johnson, John L. Bassett, John H. Folk, Sidney Thursby, R. A. Powers and W. G. French, at and for the sum of $88,075.48, as shown by Mortgage Record 65, page 244, of the records of Benton County, Arkansas. That thereafter said mortgagees filed a suit in the District Court of the United States in and for the Western District of Arkansas, and a decree of foreclosure on said mortgage was taken. That said judgment was thereafter assigned by said mortgagees in said mortgage as aforesaid, to J. L. Cunningham and R. F. Henderson under date of February 24, 1919. That there after and on March 12, 1919, the said J. L. Cunningham and R. F. Henderson sold and assigned said decree and judgment of the said United States District Court as aforesaid, to the Holland Banking Company of Springfield, Missouri. That thereafter and on December 27, 1922, said judgment was satisfied by W. N. Ufio who was Attorney in Fact for the said Holland Banking Company and authorized to satisfy said judgment in said United States District Court. That by reason thereof said mortgage from the said Towne Young and F. M. McDavid as Trustee for the Bankers Trust Company of Dallas, Texas, to the said James D.

Johnson, et al, was fully satisfied and so shown of record. That after the execution of said mortgage to the said James [illegible] Johnson, et al, as aforesaid, the said Bankers Trust Company of Dallas, Texas, by J. L. Cunningham as President and R. F. Henderson as Secretary, and Towne Young and F. M. McDavid as Trustees for said corporation, sold and conveyed by good and sufficient warranty deed all of said above described real estate, railroad and right of way, and all appurtenances thereunto belonging, to the Moark Tie & Timber Company, a corporation at that time organized and existing under the laws of the State of Arkansas with its principal place of business in the City of Rogers in said State. Said deed appearing of record in Deed Record 144, page 639 of the records of Benton County, Arkansas, and Deed record 52, page 22 and 32 inclusive of the records of Madison County, Arkansas, and Deed Record page ___ of the records of Washington County, Arkansas. That thereafter and on the 3rd day of June, 1921, the said Moark Tie & Timber Company by proper amendment to its articles of incorporation duly filed with the Secretary of State of the State of Arkansas in the City of Little Rock, and in the office of the County Clerk in and for Benton County, Arkansas, changed its name to Moark Tram Railway & Timber Company. That thereafter and on September 23, 1921, the said Moark Tram Railway & Timber Company, formerly Moark Tie & Timber Company, by W. E. Talley and R. F. Henderson who at said time were the duly elected, qualified and acting President and Secretary, respectively, of the said Moark Tram Railway & Timber Company, sold and conveyed said lands, railroad, right of way and all appurtenances thereto belonging to J. L. Cunningham and as above set forth, on September 27, 1921, the said J. L. Cunningham and wife, Henrietta E. Cunningham, made, executed and delivered to said Holland Banking Company their Mortgage Deed as above described and set forth; to secure the note herein described and set forth; which Mortgage Deed appears of record in Mortgage Record 80, page 58, of the records of Benton County, Arkansas, and Mortgage Record 20, at Pages 418, 419, 420 and 421, of the records of Madison County, Arkansas, and Mortgage Record Book ___, page ___ of the Mortgage Records of Washington County, Arkansas.

Plaintiff further states that on the 21st day of February, 1923, a resolution was passed by the Board of Directors of said Bankers Trust empowering the defendant J. Elmer Turner of Dallas, Texas as agent, and giving to him exclusive option to sell said above described real estate and railroad. That on the 29th day of May, 1923, the said J. [fol. 9] Elmer Turner entered into a contract with C. C. Briggs, defendant herein, to purchase said above described lands and railroad. That said contract was never carried out and was subject to and inferior to the mortgage held by the said Holland Banking Company and now owned by this plaintiff. That said resolution and contract as aforesaid now appears of record in Deed Record 166, page 198 of records of Benton County, Arkansas, and Deed Record —, Page — of the records of Madison County, Arkansas, and Deed Record — Page — of the records of Washington County, Arkansas.

Plaintiff further states that on April 18, 1924, the said J. L. Cunningham and wife Henrietta E. Cunningham sold and conveyed said lands to the defendant T. P. Perkins subject to the said mortgage indebtedness due the said Holland Banking Company in the sum of $79,000.00 with accrued interest thereon, which deed of conveyance appears of record in Deed Record 169, page 464 of the records of Benton County, Arkansas, and Deed Record 59, pages 248 to 252, inclusive, of the deed records of Madison County, Arkansas, and in Deed Record —, Page — of the records of Washington County, Arkansas. That said conveyance to the said T. P. Perkins was made subject to and is inferior to the Mortgage executed to the Holland Banking Company by the said J. L. Cunningham and wife, as aforesaid. That thereafter there were certain payments made on said mortgage to the said Holland Banking Company and note for which was given to secure by the said T. P. Perkins, the last payment on said note being on September 10, 1927, in the sum of $642.72. That there is now due and remaining unpaid on said note the sum of $62,885.49. That after the execution of said note as aforesaid, and said mortgage to secure same, the said Holland Banking Company became insolvent and was taken over for liquidation by the banking department of the State of Missouri, and for more than one year last past has been in process of liquidation. That on

or about the 20th day of October, 1928, J. E. Cahill as liquidating agent of the said Holland Banking Company of Springfield, Missouri, under and by virtue of an order, judgment and decree of the Circuit Court of Greene County, State of Missouri, sold, assigned, and set over said note and mortgage so executed by said J. L. Cunningham and wife to the said Holland Banking Company, to the plaintiff, and that the plaintiff is now owner thereof, and that said sale was duly approved by said Greene County Circuit Court in the County of Greene, State of Missouri, which has jurisdiction over the liquidation of the said Holland [fol. 10] Banking Company of the said City of Springfield and the State of Missouri. That there is now remaining due and unpaid on said note the said sum of $62,885.49, together with interest thereon at the rate of 7% to date of judgment. That all right of dower, homestead or equity of redemption of the defendants or either of them in and to said mortgage was specifically waived and the same was specifically waived by the said J. L. Cunningham and wife, Henrietta E. Cunningham at the time of the execution thereof. That the said J. L. Cunningham is now deceased; that the said Henrietta E. Cunningham is now in bankruptcy. That her said estate is being administered by the defendant B. K. Isaacs as Trustee in Bankruptcy for the United States District Court for the Northern District of Texas and the Ft. Worth Division thereof, and that since the purchase of said note and mortgage from the said liquidating agent of the said Holland Banking Company of the City of Springfield, Missouri, the defendant T. P. Perkins and wife, Mrs. T. P. Perkins has executed a deed covering said above described lands to the said defendant, B. K. Isaacs as such Trustee in bankruptcy, subject to the mortgage now held by this plaintiff, and that same has been filed for record in Deed Record —, page —, of the records of Benton County, Arkansas; Deed Record —, page — of the records of Madison County, Arkansas; Deed Record —, page — of the records of Washington County, Arkansas, but that said deed is subject to and inferior to the mortgage of the plaintiff, and that the note of the plaintiff has not been filed as a claim against the estate of said Henrietta E. Cunningham in said bankrupt court for the Northern District of Texas.

Wherefore, the premises being considered, plaintiff prays judgment against said lands in the sum of $62,845.49, together with all interest thereon to date of judgment, and if same be not paid within such time as may be fixed by this Court that the Commissioner of this Court be directed to sell said lands under the terms, manner and advertisement governing the sale of real estate under execution, and that out of the proceeds thereof that the judgment, interest and costs of the plaintiff be paid, and that all equity or right of redemption, homestead or dower of the defendants or either of them in and to said lands be cut off, foreclosed and forever bound; and for all other relief to which the plaintiff is entitled, either at law or in equity.

Hobbs Tie & Timber Company, by Duty & Duty, Its Attorneys.

[File endorsement omitted.]

[fol. 11] EXHIBIT "A" TO COMPLAINT

$29,000.00 September 27, 1921.

On the first day of October, 1924, value received for money loaned, I promise to pay to the order of Holland Banking Company, Seventy Nine Thousand Dollars, with interest on the same from date at the rate of 7 per cent per annum, payable semi annually until paid and evidenced until maturity of this note by six coupons of even date herewith, attached hereto. On failure to pay interest within ten days after due the holder may collect the principal and interest at once according to the tenor of certain deed of trust bearing even date herewith, given by J. L. Cunningham and H. E. Cunningham, payable to the order of the Holland Banking Company, Springfield, Missouri.

J. L. Cunningham.

(On back thereof:) Real estate bond. Without recourse pay to the order Hobbs Tie & Timber Co. Dec. 7, 1928. Holland Banking Company, by J. C. Cahill, Special Dep. Com. of Finance.

[File endorsement omitted.]

In Chancery Court of Benton County

[Title omitted]

Affidavit for Warning Order—Filed Dec. 12, 1928.

Comes John R. Duty and states that he is one of the attorneys for the plaintiff herein; that the plaintiff is a foreign corporation, and that he is authorized to make this affidavit, and *that* he *states that he* has made diligent inquiry as to the whereabouts of the defendants, and that to the best of his knowledge, information and belief all of [fol. 12] said defendants are non residents of the State of Arkansas.

John R. Duty.

Subscribed and sworn to before me this 11th day of December, 1928. Ollie Collins, Notary Public. My commission expires June 18, 1929. (L. S.)

[File endorsement omitted.]

In Chancery Court of Benton County

[Title omitted]

Warning Order

The defendants Bankers Trust Company, a corporation; J. Elmer Turner, C. C. Briggs, Henrietta E. Cunningham, T. P. Perkins and wife, Mrs. T. P. Perkins; and B. K. Isaacs as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Fort Worth Division thereof, and of the estate of Henrietta E. Cunningham, a bankrupt, are warned to appear in this court within thirty days and answer the complaint of the plaintiff in the above entitled cause.

Witness my hand and seal of said court this 12th day of December, 1928.

Marion Douglas, Chancery Clerk. (Seal.) Duty & Duty, Attorneys for Plaintiff. Robt. Butt, Attorney for Defendants.

[fol. 13] In Chancery Court of Benton County

[Title omitted]

Appointment of Counsel for Non-resident Defendants

Robt. Butt a regular licensed and practicing attorney of this bar, is hereby appointed to represent the non resident defendants Bankers Trust Company, a corporation; J. Edgar Turner, C. C. Briggs, Henrietta E. Cunningham, T. P. Perkins and wife, Mrs. T. P. Perkins; and B. K. Isaacs as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Fort Worth Division thereof, and of the estate of Henrietta E. Cunningham, a bankrupt, in the above entitled cause.

Witness my hand and seal this 12th day of December, 1928. Marion Douglas, Chancery Clerk. (Seal.)

In Chancery Court of Benton County

Appointment of Special Chancellor

Thursday morning, Jan. 10th, 1929, court met pursuant to adjournment, present and presiding the same as on first day, when the following proceedings were had and done, to wit:

Now, on this day the regular Chancellor being incapacitated on account of illness, an election was held and Paul Anderson, a regular licensed and practicing attorney of this bar was duly elected Special Chancellor. He duly qualified as such by taking the oath required by law and entered upon his duties.

[fol. 14] In Chancery Court of Benton County

[Title omitted]

Plea in Lieu of Demurrer or Answer. Filed Jan. 10, 1929

Pleading in lieu of demurrer or answer; and report. Comes Robert L. Butt, a regular licensed and practicing at-

torney of this bar, heretofore appointed by the clerk of this court to represent the non-resident defendants herein and states: that he has notified each of the defendants at his or her proper mailing address that the present action or suit was begun against him or her, and informed each such defendant of all knowledge he had which might be useful in preparing for their defense; and that he has twice so notified and informed the defendant Bankers Trust Company; that a resolute silence has been maintained by defendants, and that therefore this attorney for them can only ask that the plaintiff be held to the strictest positive proof of every material allegation of his complaint, and that any decree based thereupon be confined in its scope and effect to the very letter of the prayer of such complaint.

Robert L. Butt, Attorney for Non-resident Defts.

[File endorsement omitted.]

In Chancery Court of Benton County

[Title omitted]

Notice of Removal. Filed Jan. 10, 1929.

[fol. 15] To the Holdis Tie & Timber Company, and Messrs. Duty & Duty, its attorneys of record:

You are hereby notified that the defendant, B. K. Isaacs as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, will, on the 10th day of January, 1929, filed in the above entitled cause his petition and bond for removal of said cause to the District Court of the United States for the Western District of Arkansas at Fort Smith, a copy of said petition and bond being hereto attached.

Dated this the 9th day of January, 1929.

G. L. Grant, Wm. R. Watkins, Attorneys for B. K. Isaacs, as Trustee of the Estate of Henrietta E. Cunningham, Bankrupt.

II

That this is a controversy wholly between citizens of states other than that of which the plaintiff is a citizen, and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000.00.

III

tee in Bankruptcy of the Estate of Henrietta E. Cunningham, a Bankrupt, for the removal of this cause to the District Court of the United States for the Western District of Arkansas, Fort Smith Division, and it appearing to the Court that written notice of said petition and bond for removal has been duly given to the adverse party prior to the filing of the same, and it further appearing to the Court that the said defendant has presented and filed with his petition for removal a bond with good and sufficient sureties conditioned as required by law.

[fol 19] It is, therefore, ordered by the Court that said bond for removal be, and the same is hereby approved. It is further ordered that the said cause be, and the same is hereby removed to the District Court of the United States for the Western District of Arkansas, Fort Smith Division, and the Clerk of this Court is directed to forthwith prepare a certified copy of the record in this suit for entering in said United States District Court.

Paul Anderson, Special Judge Benton Chancery Court.

(Note by Clerk of Trial Court: Here follow in the transcript of removal pleadings and proceedings relating to an issue between E. M. Fowler and Hobbs Tie & Timber Company, which are omitted from this transcript on appeal).

Clerk's certificate to foregoing transcript omitted in printing.

[fol 20] In United States District Court

Equity. No. 485

Hobbs Tie & Timber Company

vs.

Bankers Trust Company et al.

Answer of B. K. Isaacs—Filed Feb. 11, 1929

To said Honorable Court:

Now comes B. K. Isaacs trustee in bankruptcy of the estate of Mrs. H. E. Cunningham, appearing herein in his

own behalf as such trustee, and for answer to the bill of complaint herein says:

I

This defendant has no personal knowledge of the execution of the note and mortgage described in plaintiff's petition or of the amount due and payable thereunder or of the amount that has been paid thereon, and for this reason is unable to either admit or deny the allegations of the bill of complaint in respect thereto.

II

This defendant has no personal knowledge of the allegations of the bill of complaint with respect to the matter therein alleged with reference to the Bankers Trust Company, its trustee the bankruptcy of the Ozark Land & Lumber Company, the execution of the notes and mortgages by the trustee of the Bankers Trust Company described in the bill of complaint; of the foreclosure proceedings thereon; of the satisfaction of the judgment in the foreclosure proceeding; or the transaction between the trustee of said Bankers Trust Company and the Moark Tie & Timber Company mentioned in the bill of complaint.

III

This defendant admits upon information the allegation with respect to the conveyance of the land in question to J. L. Cunningham and the conveyance by J. L. Cunningham and wife *to* T. P. Perkins; but, in connection with the conveyance of said land to the said T. P. Perkins, this defendant alleges that said conveyance was made to the said T. P. Perkins in trust only for the benefit of the said J. L. Cunningham and his wife, Henrietta E. Cunningham, for convenience in handling, as the plaintiff herein well knows and knew at the time it entered into negotiations for the purchase of the note in question from the liquidating agent [fol. 21] of the Holland Banking Company.

IV

Heretofore on the 14th day of September, 1928, the defendant herein, who is a resident and citizen of Fort Worth,

Tarrant County, Texas, was duly appointed as trustee in bankruptcy of the estate of Mrs. Henrietta E. Cunningham, David W. Cunningham and a co-partnership existing between said individual bankrupts doing business under the name of Banking House of Cunningham Brothers, at Palo Pinto, Texas, in a bankruptcy proceeding in the District Court of the United States for the Northern District of Texas, Fort Worth Division, and numbered 1540 in bankruptcy on the docket of said court. That upon his appointment aforesaid, the defendant duly qualified and since said date has been and now is the duly qualified and acting trustee in bankruptcy of the several estates of said bankrupts, and as such is entitled to all the rights of a trustee in bankruptcy under the Acts of Congress relating thereto.

That at the time of the filing of the petition in bankruptcy in said matter in the District Court of the United States for the Northern District of Texas at Fort Worth, the said bankrupt, Mrs. Henrietta E. Cunningham, was the owner of the lots, tracts, or parcels of land, lying and situated in the Counties of Benton, Madison and Washington, in the State of Arkansas, described in the bill of complaint.

That at said time, and for some time prior thereto, the legal title of said property had been conveyed by said bankrupt and her then deceased husband, J. L. Cunningham, to one T. P. Perkins as trustee (whose trust was not disclosed in said conveyance, however), for the purpose of permitting the said trustee to better handle, manage and control said property. That the conveyance to the said T. P. Perkins was executed by J. L. Cunningham and his wife, the bankrupt, Mrs. Henrietta E. Cunningham, on the 10th day of April, 1924. That thereafter and to wit, on the __ date of May, 1924, the said J. L. Cunningham died, leaving a last will and testament, wherein he devised and bequeathed to the said Mrs. Henrietta E. Cunningham, all property both real and personal, belonging to him at the time of his death. That said will was thereafter duly and legally admitted to probate in accordance with the laws of Texas by the Probate Court of Palo Pinto County, Texas. [fol. 22] That upon the appointment and qualification of the defendant herein as the trustee in bankruptcy of the said Mrs. Henrietta E. Cunningham, he becomes by virtue

of the premises invested with the title and all of the rights and interests of the said Mrs. Henrietta E. Cunningham, bankrupt, in and to the property hereinbefore described, and in recognition of that fact, the said T. P. Perkins, on the 17th day of October, 1928, made, executed and delivered to the defendant herein a deed, reciting the fact that said property had theretofore been conveyed to him by J. L. Cunningham and his wife by deed, dated April 18th, 1924, recorded in Book 169, page 464 of the Deed Records of Benton County, Arkansas, and in Book 59, page 248 of the Deed Records of Madison County, Arkansas; that the same was conveyed to him in trust for facility in handling the same, it not being the intention on the part of the grantors therein to part with their beneficial interest in said lands, and further reciting the fact that it was the desire of the said Mrs. Henrietta E. Cunningham that the said T. P. Perkins convey said property to her trustee in bankruptcy. That said deed was thereafter duly recorded in the office of the Circuit Clerk and Ex-officio Recorder of the County of Benton and State of Arkansas on the 29th day of October, 1928, in Record Book 192, page 247 of the Records of said County.

That the property hereinbefore described was duly listed as an asset of the estate of the bankrupt in said bankruptcy proceeding in the Northern District of Texas in the schedules filed by the Bankrupts therein on the 20th day of August, 1929, and upon his appointment and qualification as aforesaid, the defendant entered into possession of said premises and since that time, and at the present time, he has been in lawful and peaceable possession thereof as trustee in bankruptcy aforesaid.

That on or about the 7th day of December, 1928, the note executed by the said J. L. Cunningham as aforesaid, the payment of which was secured by said mortgage was transferred and assigned in a manner unknown to the defendant, but which upon information and belief he alleges was in this fashion, viz: That said Holland Banking Company of Springfield, Missouri, became insolvent and was taken over for liquidation by the Banking Department of the State of Missouri more than one year ago. That the liquidating agent of said Bank, about the 20th day of October, 1928, applied for and obtained an order from the Circuit

claimed to be due thereon, is due and sets up no defense to a foreclosure, by the plaintiff in this action, and does not state any other facts sufficient to constitute a defense against the action of the plaintiff herein, and that all relief asked for by the defendant trustee in bankruptcy, can be [fol. 26] preserved and taken care of in the distribution of the proceeds of the sale of the real estate, as described and set forth in the bill of complaint filed herein, and that all allegations made in the answer of said trustee in bankruptcy, and the relief prayed for should be taken up in this court at the time of distribution of said proceeds.

Wherefore, the plaintiff prays that all that part of the answer of the said B. K. Isaacs, Trustee, which seeks to delay foreclosure and sale be dismissed, and that the plaintiff have judgment and order of sale upon the pleadings herein, and for costs, and for all other relief to which the plaintiff is entitled.

Hobbs Tie & Timber Company, by W. N. Ivie, Duty & Duty, Its Attorneys.

In United States District Court

[Title omitted]

Amendment to Answer of B. K. Isaacs. Filed March 18, 1929

Comes now the defendant, B. K. Isaacs, Trustee in Bankruptcy, one of the defendants in the above entitled cause, and moves the Court to grant him leave to amend paragraph 4 of his original answer herein, by adding by way of interlineation after the end of the 2nd paragraph on the Fourth page of said answer the following, to wit:

"That on said 14th day of September, 1928, this defendant was authorized and directed to sell said property, by an order duly entered on said date by the Referee in Bankruptcy of said District Court of the United States for the Northern District of Texas, authorizing and directing this defendant to offer for sale and sell all, or any part, of the estates of the bankrupts aforesaid, at public, or pri-

vate, sale, for cash, or on terms and subject to, or free of liens."

G. L. Grant, Wm. R. Watkins, Attorneys for the Defendant, B. K. Isaacs, Trustee.

[fol. 27] In United States District Court

[Title omitted]

Order Granting Leave to Amend Answer of B. K. Isaacs, Trustee—March 18, 1929

This March 18, 1929, comes the plaintiff, by its solicitors, and comes the defendant B. K. Isaacs, Trustee in Bankruptcy, by his solicitors, and said defendant files motion for leave to amend his answer herein.

Said application coming on for hearing, the court being well and sufficiently advised in the premises doth sustain the same, and said defendant's answer is treated as amended as set out in said application.

Frank A. Youmans, Judge.

In United States District Court

Proof of Publication of Warning Order. Filed March 19, 1929

State of Arkansas
County of Benton:

I, James P. Shofner do solemnly swear that I am editor and publisher of the Rogers Daily News, a daily newspaper having a general circulation, published in the City of Rogers, Benton County, Arkansas, and do solemnly swear that the annexed notice was published for consecutive weeks in said newspaper, the said publications being made on the 14th day of December, 1928, 21st day of December, 1928, 28th day of December, 1928, 4th day of January, 1929.

James P. Shofner.

Subscribed and sworn to before me this 16th day of March, 1929. H. H. Miller, Notary Public. My commission expires March 3, 1932. (Seal.)

Warning Order

Hobbs Tie & Timber Company, a corporation, plaintiff, vs. Bankers Trust Company, a corporation; J. Elmer Turner, C. C. Briggs, Henrietta E. Cunningham, T. P. Perkins and wife, Mrs. T. P. Perkins; and B. K. Isaacs as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Fort Worth Division thereof, and of the Estate of Henrietta E. Cunningham, a bankrupt, defendants.

The defendants, Bankers Trust Company, a corporation; J. Elmer Turner, C. C. Briggs, Henrietta E. Cunningham, T. P. Perkins, and wife, Mrs. T. P. Perkins; and [fol. 29] B. K. Isaacs as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Fort Worth Division thereof, and of the estate of Henrietta E. Cunningham, a bankrupt, are warned to appear in this court within 30 days and answer the complaint of the plaintiff in the above entitled cause.

Witness my hand and seal of said court this 12th day of December, 1928.

Marion Douglas, Chancery Clerk. Duty & Duty, Attys., for Plaintiff. Robt. Butt, Atty. for Defendants.

(Rogers News, Dec. 14 21 28 Jan. 4)

In United States District Court

Decree—March 19, 1929

Now on this 19th day of March, 1929, this cause having been argued and submitted on March 18, 1929, and having come on for hearing upon the complaint of the plaintiff, the answer of the defendant B. K. Isaacs as Trustee in Bankruptcy for the District Court of the United States, Northern District of Texas and the Fort Worth Division there-

The Southeast Quarter of the Southeast Quarter, the West half of the Southeast Quarter and the Southwest Quarter of Section 29 in Township 19 North, of Range 27 West.

The North half of North half of Section 4 and the Northeast Quarter of Northeast Quarter of Section 8, Township 18 North, Range 28 West; also East half Northwest Quarter North half of Southwest Quarter and Northwest Quarter of Southeast Quarter Section 17; also Northeast Quarter of Southeast Quarter, Southwest Quarter of Northeast Quarter, West half of Southeast Quarter and East half of Southwest Quarter of Section 19; also East half of Southeast Quarter, Northwest Quarter of Southeast Quarter, Northeast Quarter of Southwest Quarter, Southwest Quarter of Northeast Quarter and Northwest Quarter of Section 20.

Also Northeast Quarter of Northeast Quarter, Southwest Quarter of Northwest Quarter and Southwest Quarter of Section 29; also Southeast Quarter of Southeast Quarter, North half of Southeast Quarter, West half of Northeast Quarter and Northwest Quarter Section 30 in Township 19 North, Range 27 West; also Southwest Quarter of Southeast Quarter Section 10; also Southwest Quarter of Southeast Quarter, Southwest Quarter of Northeast Quarter, and Southeast Quarter of Northwest Quarter Section 11; also West half of Southeast Quarter and Southwest Quarter Section 13; also Southwest Quarter of Southeast Quarter, East half of Southeast Quarter and Southwest Quarter of Section 14; also Southwest Quarter of Southwest Quarter and Southeast Quarter of Section 15; also Southeast Quarter of Southeast Quarter and West half of Northwest Quarter of Section 16; also Northeast Quarter of Section 17; also East half of Northeast Quarter and South half of Section 19; also West half of Northwest Quarter, Southeast Quarter of Northwest Quarter, South half of Northeast Quarter, [fol. 31] North half of Southwest Quarter, south half of Southeast Quarter, Northwest Quarter of Southeast Quarter Section 20; all of Section 21; all of Section 22; all of Section 23, except Southwest Quarter of Southeast Quarter; also West half of Northeast Quarter and West half of Section 24; also Northwest Quarter of Southeast Quarter, Northeast Quarter of Southwest Quarter and West half of Northwest Quarter Section 25; also Northeast Quarter of Northeast Quarter, Northwest Quarter of Northwest Quarter, South half of North half, South half of Southwest Quarter and Southeast Quarter of Section 26; also South half of Southwest Quarter and North half of Section 27; all of Section 28; also Northeast Quarter of Northeast Quarter, Southwest Quarter of Southwest Quarter, South half of North half and North half of South half of Section 29; also Southeast Quarter of Northeast Quarter, North half of Northeast Quarter and East half of Southeast Quarter Section 30; Southwest Quarter of Southwest Quarter, West half of Northeast Quarter, North half of Southwest Quarter and Northwest Quarter of Section 33; also Northeast Quarter of Northeast Quarter, South half of Northeast Quarter, North half of Northwest Quarter and ten acres off of East side of Southeast Quarter of Northwest Quarter Section 34; also West half of Northwest Quarter, Northeast Quarter,

of Northwest Quarter, North half of Northeast Quarter, Southwest Quarter of Northeast Quarter and East half of Northwest Quarter of Southeast Quarter of Section 35; also West half of Northwest Quarter of Section 36 all in Township 19 North, of Range 28 West; also East half of Southeast Quarter Section 24, Township 19 North, Range 29 West, and West half of Northeast Quarter and East half of the Northwest Quarter of Section 27, Township 19 North, Range 27 West.

The Northwest Quarter of Section 20 in Township 19 North, Range 27 West.

The Southwest Quarter of Southeast Quarter, Southeast Quarter of Southwest Quarter and Southwest Quarter of Southwest Quarter of Section 16, Township 19 North, Range 28 west, and Northeast Quarter of the Southeast Quarter of Section 35, the Northwest Quarter of the Southwest Quarter of Section 36, all in Township 19 North, of Range 28 West; also that part of the Northeast Quarter of Northwest Quarter containing 32.15 acres of Section 5; also Southwest Quarter of Northwest Quarter containing 42.22 acres of Section 6 in Township 18 North, of Range 28 W.

[fol. 32] Washington, County, Arkansas

The Southwest Quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter Section 13, Township 18 North, of Range 28 West.

Madison County, Arkansas

The Southeast Quarter of the Southwest Quarter of Section 4, Township 18 North, Range 27 West.

The Northeast Quarter of the Southeast Quarter and the South half of the South half of Section 2, Township 17 North, Range 26 West.

The North half of the Southwest Quarter and the Southeast Quarter of Section 27, Township 19 North, Range 27 West.

The Southwest Quarter of the Southeast Quarter of Section 22, the Northwest Quarter of the Northeast Quarter, the South half of the Northeast Quarter and the South half of the Northwest Quarter of Section 27, Township 19 North, Range 27 West.

The Southeast Quarter of the Northwest Quarter of Section 10, Township 18 North, Range 27 West.

The North half of the Southwest Quarter and 39 acres more or less, of the Southeast Quarter of the Northwest Quarter of Section 3, Township 18 North, Range 27 West.

The West half of the Northeast Quarter, and the West part of the Northeast Quarter of the Northeast Quarter, containing 28 acres, of Section 11, Township 17 North, Range 26 West.

The East half of the Northwest Quarter, the Southwest Quarter of the Northeast Quarter and the Northeast Quarter of the Southwest Quarter of Section 17, Township 18 North, Range 27 West.

The Northeast Quarter of the Southwest Quarter and the South half of the South half Section 2, the Southeast Quarter Section 3, the Northeast Quarter Section 10, the Northeast Quarter of the Northwest Quarter and the West Half of the Northeast Quarter Section 11, Township 17 North, Range 26 West, one acre in the Northeast Quarter of Section 10, Township 17, Range 26, reserved.

The West half of the Northeast Quarter and the North half of the Southeast Quarter of Section 15, Township 18 North, Range 26 West.

[fol. 33] The South half of the Northwest Quarter of Section 35, Township 19 North, Range 27 West.

The West half of the West half of Section 21, and the West half of the Northwest Quarter of Section 28, Township 19 North, Range 27 West.

The Northwest Quarter of the Southwest Quarter and the West half of the Northwest Quarter of Section 4, Township 18 North, Range 27 West.

The South half of the Northeast Quarter and the Southeast Quarter Section 27, the Northeast Quarter of the Northeast Quarter Section 34 and the Northwest Quarter of the Northwest Quarter Section 35, Township 19 North, Range 27 West.

The Southwest Quarter of the Northwest Quarter and the East half of the Northwest Quarter of Section 9, Township 18 North, Range 27 West.

The South half of the Northwest Quarter of Section 27 Township 19 North, Range 27 West.

Together with a certain line of railroad and right-of-way commencing at a point in Benton County at the Town of

Monte Ne in said County, and extending in an easterly direction for a distance of approximately five miles, together with all rails, ties, bridges, and other equipment.

The Court further finds that on December 12, 1917 that Towne Young and F. M. McDavid as Trustees for the Bankers Trust Company, a corporation of Dallas, Texas, became the owners of said lands, railroad and right-of-way, and all property described herein, and as above set forth, by virtue of a certain sale from the bankrupt court of the United States in and for the Western District of Arkansas and the Ft. Smith Division thereof, in the matter of the Ozark Land & Lumber Company, a bankrupt, being No. 456 in Bankruptcy, wherein Perry N. Clark was Trustee, and under and by orders of said bankrupt court the property was sold by the said Perry N. Clark and the said Towne Young and F. M. McDavid as Trustees became the purchasers thereof, and received a deed from the said Perry N. Clark as such Trustee in Bankruptcy in and for said United States District Court for the Western District of Arkansas and the Ft. Smith Division thereof, and that thereafter the said Towne Young and F. M. McDavid as Trustees for the said Bankers Trust Company of Dallas, Texas executed a certain mortgage deed in the sum of $16,667.00 on said lands, railroad and right-of-way to the Holland Banking Company of Springfield, Missouri, which [fol. 34] appears of record in Mortgage Record 65 at Page 242, but that said mortgage was thereafter satisfied, paid in full and the record thereof satisfied. That thereafter, on the 11th day of December, 1917, the said Towne Young and F. M. McDavid as Trustees for the said Bankers Trust Company of Dallas, Texas, executed their mortgage deed to James D. Johnson, James H. Birch, Jr., Frank A. Potter, E. C. Smith, Attorneys-in-fact and Trustees of D. L. Whitmore, J. H. Birch, H. G. McFadden, G. W. Carroll, F. C. Foster, James D. Johnson, John L. Bassett, John H. Folk, Sidney Thursby, R. A. Powers and W. G. French, in and for the sum of $88,075.48, as shown by Mortgage Record 65, Page 244 of the records of Benton County, Arkansas. That thereafter said mortgagees filed a suit in this Court and a decree of foreclosure on said mortgage was taken. That said judgment and decree was thereafter assigned by said mortgagees in said mortgage

as aforesaid to J. L. Cunningham and R. F. Henderson under date of February 24, 1919, that thereafter and on March 12, 1919 the said J. L. Cunningham and R. F. Henderson assigned said decree and judgment of the [illegible] to the Holland Banking Company of Springfield, Missouri; that thereafter and on December 27, 1922 said judgment was satisfied by W. N. Ivie who was Attorney in Fact for the said Holland Banking Company and authorized to satisfy said judgment, that by reason thereof said mortgage from the said Towne Young and F. M. McDavid as Trustees for the Bankers Trust Company of Dallas, Texas to the said James D. Johnson, et al, was fully satisfied, as shown on record. That after the execution of said mortgage to the said James D. Johnson, et al, as aforesaid, the said Bankers Trust Company of Dallas, Texas by J. L. Cunningham as President and R. F. Henderson as Secretary, and Towne Young and F. M. McDavid as Trustees for said corporation, sold and conveyed by good and sufficient warranty deed all of the above described real estate, railroad and right of way and all appurtenances thereto belonging to the Moark Tie & Timber Company, a corporation, at that time organized and existing under the laws of the State of Arkansas and with its principal place of business in the City of Rogers in said State; that said deed appears of record in Deed Record 144, Page 639, of the records of Benton County, Arkansas, and Deed Record 52, Page 22 to 32 inclusive, of the records of Madison County, Arkansas, and also of record in the deed records of Washington County, Arkansas. That thereafter and on the 3rd day of June, 1921 the said Moark Tie & Timber Company, by proper amendment to its articles of incorporation, duly [fol. 35] filed with the Secretary of State of the State of Arkansas in the City of Little Rock, and in the office of the County Clerk in and for Benton County, Arkansas, changed its name to Moark Tram Railway and Timber Company; that thereafter and on September 23, 1921 the said Moark Tram Railway & Timber Company by W. E. Talley and R. F. Henderson who at said time were the duly qualified and acting President and Secretary, respectively, of the Moark Tram Railway & Timber Company sold and conveyed said lands, railroads, right-of-ways and all appurtenances thereunto belonging to J. L. Cunningham as

above set forth on September 27, 1921 and that the said J. L. Cunningham and wife Henrietta E. Cunningham made, executed and delivered to the said Holland Banking Company their Mortgage Deed as above described and set forth and to secure the note herein described and set forth, which Mortgage Deed appears of record in Mortgage Record 80, page 48, of the records of Benton County, Arkansas, and Mortgage Record 20, Pages 418, 419, 420, and 421 of the records of Madison County, Arkansas, and also in the Mortgage Record of Washington County, Arkansas.

The Court further finds that on the 21st day of February, 1923 a resolution was passed by the Board of Directors of the defendant Bankers Trust Company, empowering the defendant J. Elmer Turner of Dallas, Texas as agent and attorney-in-fact to effect a option to sell said above described real estate and railroad; that on the 29th day of May, 1923, the said J. Elmer Turner entered into a contract with the defendant C. C. Briggs to purchase said above described lands and railroad; that said contract was never carried out and was subject to and inferior to the mortgage executed to the said Holland Banking Company and now held by the plaintiff herein; that said resolution and contract as aforesaid, appears of record in the office of the Recorder in and for Benton, Madison and Washington Counties, Arkansas.

The Court finds that on April 18, 1924 the said J. L. Cunningham and wife, Henrietta E. Cunningham sold and conveyed said lands, railroad and right of way covered by the mortgage of the plaintiff herein to the defendant T. P. Perkins but said deed of conveyance was subject to and inferior to the indebtedness due the Holland Banking Company, at that time represented by the note sued on in this action and with the accrued interest thereon; that said deed of conveyance now appears of record in Deed Record 109, Page 464, of the records of Benton County, Arkansas, and Deed Record 59, Pages 248 to 252 inclusive, of the deed records of Madison County, Arkansas, and of record [fol. 36] in the deed records of Washington County, Arkansas. That said deed of conveyance from said Cunningham and wife to the said T. P. Perkins was in all things subject to and inferior to the mortgage executed to the

said Holland Banking Company by the said J. L. Cunningham and wife as herein set forth.

The Court finds that thereafter there were certain payments made on said mortgage to the Holland Banking Company and the note for which same was given to secure; that the last payment made on said note was on September 10, 1927 in the sum of $642.72, made by the said T. P. Perkins, at that time the owner of the equity of redemption.

The Court finds that after the execution of said note as aforesaid and the mortgage to secure same, the said Holland Banking Company became insolvent and was placed in charge of the State Banking Department of the State of Missouri for liquidation and that on or about the 20th day of October, 1928, that the said State Banking Department of the State of Missouri, under and by virtue of an order, judgment and decree of the Circuit Court of Green County in the State of Missouri, sold, assigned and set over said note and mortgage so executed by the said J. L. Cunningham and wife to the said Holland Banking Company to the plaintiff Hobbs Tie & Timber Company, a corporation organized and existing under the laws of the State of Delaware, but admitted to do business as a foreign corporation in the State of Arkansas, and that said corporation is now the owner of said note and the security.

The Court finds that there is now due and remaining unpaid on said note, together with principal and interest, the sum of $956,020.65.

The Court finds that all right of dower, homestead or equity of redemption of the makers of said mortgage securing said note, was specifically waived by them at the time of the execution thereof, and under the Act of the General Assembly of the State of Arkansas, approved May 8, 1899; that said J. L. Cunningham is now deceased; that the said Henrietta E. Cunningham is now in bankruptcy; that her said estate is being administered by the defendant B. K. Isaacs as Trustee in Bankruptcy for the District Court of the United States for the Northern District of Texas and the Ft. Worth Division thereof, and that the plaintiff is not seeking any personal judgment on said note against said Trustee in Bankruptcy of the estate of the said Henrietta E. Cunningham. That after said sale to

the said Hobbs Tie & Timber Company as aforesaid, the [fol. 37] said T. P. Perkins and wife executed a deed covering said lands, railroad, right-of-way and appurtenances thereto belonging to the said B. K. Isaacs as such Trustee in Bankruptcy, but that said deed was subject to and inferior to the mortgage held by the plaintiff, and that said indebtedness due on said promissory note as aforesaid to the plaintiff is long past due and remains unpaid, and that the plaintiff is entitled to a judgment and decree of foreclosure, against the lands and property above described.

It Is Therefore Considered, ordered, adjudged and decreed by the Court that the plaintiff do have and recover of and from said above described real estate, railroad, railroad right-of-way and appurtenances thereunto belonging, the said sum of $66,020.65, together with all of its cost herein, and that said judgment bear interest from this date at the rate of 7%, and that the same is declared a lien against said above described real estate, railroad, railroad right-of-way, and appurtenances thereunto belonging and described in said mortgage, and that the Special Master of this Court hereinafter designated and appointed, be and he is hereby directed if said judgment, interest and costs is not paid within ten days from this date, to proceed to sell said lands, railroad, railroad right-of-way and appurtenances thereunto belonging above described at public sale, at the court house of Benton County, at Bentonville, Arkansas, after first giving notice of such proposed sale. Said notice of sale shall be published once a week for four weeks prior to such sale in a weekly newspaper printed, regularly issued, and having a general circulation in Benton County, Arkansas, and also published once a week for four weeks in a newspaper printed, regularly issued and having a general circulation in Madison County, Arkansas, and of the proceeds of said sale, the same be applied to the satisfaction of the judgment, interest and costs of the plaintiff herein, and if there be a surplus over and above the amount to pay said judgment, interest and costs, that the same be turned over after all expenses have been paid, to the said B. K. Isaacs as Trustee in bankruptcy for the state of the said Henrietta E. Cunningham as herein specified.

G. T. Sullins of Fayetteville, Arkansas, is hereby appointed by this Court as Special Master to carry out this decree and to make said sale as herein ordered, and that [fol. 38] this cause be continued for report of said Special Master and for such further orders as may be proper.

Frank A. Youmans, Judge.

In United States District Court

Petition for Appeal—Filed April 10, 1929

To said Honorable Court:

Feeling himself aggrieved at the order and decree of this Honorable Court, entered herein on the 19th day of March, 1929, dismissing his answer and rendering judgment on the pleadings in favor of the plaintiff, the defendant B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, respectfully prays the allowance of an Appeal from said order to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, where the errors of this court may be examined and corrected. Your petitioner further prays that, as he is a trustee in bankruptcy, his appeal be allowed without requiring him to furnish security for costs thereof; and that the court in allowing same, grant a supersedeas of its judgment of foreclosure and sale, likewise without security, as is provided in the Acts relating to Bankruptcy.

G. L. Grant and Wm. R. Watkins, Attorney for the Defendant, B. K. Isaacs, as Trustee in Bankruptcy of Henrietta E. Cunningham, Bankrupt.

In United States District Court

Order Allowing Appeal—April 10, 1929

On this the 10th day of April, 1929, came B. K. Isaacs as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, and filed his petition for the allowance of an appeal from the decree entered herein on the

19th day of March, 1929, together with his assignment of errors and prayer for reversal, upon consideration whereof;

It is ordered, that said petition for appeal be, and it is hereby allowed, and, as the said B. K. Isaacs is a trustee in bankruptcy, it is further ordered that he be, and is hereby permitted to prosecute the same without bond for costs.

It is further ordered that proceedings for the enforcement of the decree entered herein be not stayed during the [fol. 39] pendency of said appeal as prayed for by said trustee, without a supersedeas bond, to the refusal of which stay he excepts and with permission of the court files an additional assignment of error at the time of allowance of the appeal.

Frank A. Youmans, United States District Judge.

In United States District Court

Assignment of Errors—Filed April 10, 1929

Now comes the defendant, B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, and files the following assignment of errors upon which he will rely in the United States Circuit Court of appeals for the Eighth Circuit, for reversal of the decree entered herein on the 9th day of March, 1929:

1. The court erred in sustaining the motion of the plaintiff to strike out and dismiss the answer of this defendant, and in thereupon entering judgment on the pleadings.

2. The court erred in ordering and decreeing the foreclosure and sale of the property in controversy herein.

Wherefore, said defendant prays that the decree aforesaid be reversed.

G. L. Grant and W. R. Watkins, Attorney for the Defendant, B. K. Isaacs, as Trustee in Bankruptcy of Henrietta Emma Cunningham, Bankrupt.

In United States District Court

Additional Assignment of Errors—Filed April 10, 1929.

Now comes the defendant B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, and files the following additional assignment of error, with permission of the court, at the time of the allowance and filing of his petition for appeal herein, to-wit:

3. The court erred in refusing to allow his appeal herein without bond for damages being furnished as required of [fol. 40] other appellants in ordinary cases, in order to supersede the operation and enforcement of the decree appealed from.

G. L. Grant and Wm. R. Watkins, Attorney for Defendant B. K. Isaacs, as Trustee in Bankruptcy of Henrietta E. Cunningham, Bankrupt.

In United States District Court

Precipe for Transcript—Filed April 10, 1929

The parties to the appeal in the above entitled cause, hereby agre that the Clerk may, and he is hereby requested to incorporate in the record to be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit, the following papers, to-wit:

1. Transcript of record from State Court (omitting descriptions and formal parts.)

2. Answer of B. K. Isaacs, including amendment filed March 18th, 1929.

3. Motion to dismiss answer of defendant, B. K. Isaacs, and for judgment on pleadings.

3. Decree.

4. Petition for Appeal.

5. Order of allowance thereof.

6. Assignment of errors.

7. This præcipe.

8. Clerk's Certificate.

9. Proof of Publication of Warning Order.

And that there shall be attached to and sent up with the record the original writ of error and citation on appeal.

G. L. Grant, W. R. Watkins, Attorneys for B. K. Isaacs. —— ——, Attorney for Hobbs Tie & Timber Company.

[fols. 41 & 42] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] In United States Circuit Court of Appeals for the Eighth District

No. 8584

B. K. Isaacs, as Trustee in Bankruptcy of Henrietta E. Cunningham, Bankrupt, Appellants,

vs.

Hobbs Tie & Timber Company, Appellee.

Appeal from the United States District Court for the Western District of Arkansas, Fort Smith Division

Motion for Supersedeas or Stay of Decree Appealed From —Filed April 18, 1929.

To said Honorable Court:

Come now the Appellant and respectfully represents to the court:

I.

This suit was instituted in the Chancery Court of Benton County, Arkansas, by the appellee against the appel-

lant and others to foreclose a mortgage given by the de- [fol. 44] ceased husband of the bankrupt on 12000 acres of timber land in Arkansas, devised to the bankrupt by her husband and owned by her at the time of her adjudication in bankruptcy, which land came into the possession of appellant as trustee of bankruptcy, several months prior to the filing of the suit.

Appellant removed the cause to the district court on the ground of diversity of citizenship where he answered, setting up his appointment and qualification as trustee, that he was in possession of the property prior to the institution of the suit, that it was instituted without the consent of the court of bankruptcy, that the general creditors have a substantial equity in the property, to-wit, $40,000.00, and that an order of sale of said property had been entered by the bankruptcy court prior to the institution of this suit, by reason of which the court had no authority to entertain the foreclosure proceedings and order a sale of the property.

The appellee filed a motion to dismiss the answer and for judgment on the pleadings. The motion to dismiss the answer was treated as a motion to strike, and on hearing the motion was granted and a decree entered establishing the appellee's debt and lien, foreclosing the same and ordering the property sold by a special master on thirty days' notice after the expiration of ten days from the date of decree which was March 19, 1929. The special master has fixed May 6 as the sale date.

[fol. 45] II

The appeal herein was duly allowed and the court permitted the appellant to prosecute the same without cost bond, but refused to stay the foreclosure sale pending the appeal or to order that the allowance thereof should operate as a supersedeas.

Appellant excepted to this ruling and with permission of the court at the same time filed an additional assignment of error challenging the correctness of the ruling of the court in denying the stay and supersedeas.

III

This being an appeal by a truste in bankruptcy, the appellant as such trustee respectfully represents that he is

entitled to prosecute the same without bond for damages and that the proceedings for the sale of the property in controversy should be stayed by this court under the provision of Section 25 of the Bankruptcy Act and Revised Statutes 1001. (Title 11, U. S. C. A. Section 48 (b), and title 28, U. S. C. A., Section 870), as fully shown in the Argument hereto attached as a part of this motion.

From the foregoing statement of the case it is apparent that the sale of the property involved will result in great injury to the bankrupt estate, and believing as he does that no bond is required of him to supersede the enforcement of the decree appealed from, the appellant feels that [fol. 46] he would not be justified in putting the estate in jeopardy on account of such bond or of incurring the expense incident to securing a bond.

Wherefore, Premises Considered, appellant prays that upon consideration of this motion an order be entered herein, staying the enforcement of the decree appealed from during the pendency of this appeal.

Argument and Authorities

It is apparent that the only question involved on the appeal is:

May a mortgagee foreclose his mortgage even in a Federal Court where the property on which he has a lien is in custody of a bankruptcy court, and the trustee has charge thereof, without the consent of the Bankruptcy Court?

We say not, under the numerous decisions of this court, and of the Supreme Court. U. S. F. & G. Company v. Bray, 225 U. S. 205; Knauth v. Latham & Company, 242 U. S. 426; Taylor v. Voss, 271 U. S. 176; Lazarus v. Prentice, 234 U. S. 263; Acme Harvester Company v. Beekman, 222 U. S. 300; First Trust Company v. Baylor, 1 F. (2d) 24; Re Holstein Harvey, Inc., 26 F. (2d) 798; First Savings Bank & Trust Company v. Butler, 282 F. 866; Britton v. Western Iowa Company 9 F. (2d) 488, 490; and see Re Patterson Lumber Co., 247 Fed. 578, per Sanford, D. J., [fol. 47] in which foreclosure proceedings have been enjoined under similar circumstances, but we pre-termit a discussion of that question here.

On this motion the only question is:

Can a trustee in bankruptcy appeal and have a stay of the judgment without giving a supersedeas bond, and if so, where the lower court has refused to grant the stay, may this court do so?

The Bankruptcy Act (11 U. S. C. A., Section 48 (b)) provides:

"Trustees shall not be required to give bond when they take appeals or sue out writs of error."

The general provisions relating to appeals and writs are as follows:

Title 28, Section 870:

"Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a circuit court of appeals, either by the United States or by direction of any department of the Government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against [fol. 48] the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted." (R. S., Section 1001; March 3, 1911, c. 231, Sections 118, 289, 26 Stat. 1131, 1167.)

Title 28, Section 869:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." (R. S., Section 1000.)

Title 28, Section 874:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judg- [fol. 49] ment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days. (R. S., Section 1007; February 18, 1875, c. 80, Section 1, 18 Stat. 318.)

So far as we have been table to find, the question has never been directly presented to any court. It was indirectly presented in the Ninth Circuit in Pacific Coast Casulty Company v. Harvey, 250 Fed. 952, and without analysis or discussion, Section 48b of the Bankruptcy Act was construed adversely to our contention. In that case the court say:

"It is true that under Section 25c of the Bankruptcy Act (now 11, U. S. C. A. 48b), the trustee was not required to give bond when he took the appeal or sued out a writ of error; but a supersedeas pending the appeal, though an auxiliary, was a separate matter. The appellate court could undoubtedly have reviewed the proceedings, even though appellant had failed to give any bond to supersede the proceedings on a judgment or decree entered against him. Logan v. Goodwin, 104 Fed. 494. Revised Statutes, Section 1000 (28 U. S. C. A., 869), is the general provision on appeal, for costs and damages or for costs only, according to whether or not supersedeas is obtained; but we do not think that Section 25c (11 U. S. C. A., 48b) relieving a trustee in bankruptcy from giving bond on appeal or writ of error, relieves him from the obligation to give such a bond as is required of any litigant where supersedeas is [fol. 50] desired. In Re Barrett, 132 Fed. 362."

In that case the issue was as to whether a surety on a bond given in the form of supersedeas bond was liable for costs adjudged against a trustee in bankruptcy, so that what was said with reference to supersedeas is really no more than dicta. The case of Barrett, 132 Fed. 362, cited in the opinion, did not involve the question at all. There a receiver in bankruptcy had instituted a suit in equity for injunction and other relief, and a motion was filed to require him to give a cost and injunction bond as in other cases. It was held by the District Court he should not be required to do so. The ruling in the Pacific case for which it is cited as authority was not decided or discussed. So far as we have found the case has never been cited by any other court on the point at issue.

When we look to the nature and purpose of Section 48-b, there can be little doubt of the intention of Congress. Trustees in bankruptcy are officers of the court appointing them. In Re Cadenas & Coe, 178 Fed. 158; In Re Howard, 130 Fed. 1004, 135 Fed. 721. Their office is created by Congress (11 U. S. C. A., 61: "The offices of referee and trustee are created"). They have powers defined by the Act (11 U. S. C. A., 75) and a title conferred by it upon them (11 U. S. C. A., 110). Property thus acquired is held by them by virtue of their office, in custodia legis, U. S. F. & G. Company v. Bray, 225 U. S. 205; Robertson v. Howard, 229 U. S. 254; [fol. 51] In Re Sheinman, 14 Fed. (2) 323; In Re Eppstein, 156 Fed. 42. Clearly their rights, powers and relation to the property is of a higher order than possessed by any other custodian or receiver that could be appointed by the judicial branch of the government.

From the standpoint of creditors and those with whom the trustee may litigate, their rights and the trustee's are fixed as of the adjudication. The former are entitled to a distribution of the estate under principles fixed by the act, the latter is entitled to enforce this distribution and to protect and recover the estate. No provision of the act or any other act, contemplates that a creditor can by virtue of any action by the trustee secure a greater benefit from the estate than is contemplated under its provisions for the distribution of it. For instance, the trustee may contest a claim and on losing appeal, but, if he gives a supersedeas against the collection of a dividend, as a supersedeas is ordinarily

given, the estate would, the trustee being defeated on the appeal, be liable for the entire claim. A more apt illustration is afforded by the facts of this case. Here, under the provisions of the act and all the decisions the trustee is seeking to deprive the appellee of the remedy of foreclosing without the consent of the bankruptcy court, on property in custodia legis. This right has been denied him and he appeals. It is said he has no right to stay the sale without a supersedeas bond. Now, what damages could be here [fol. 52] allowed the appellee, a creditor, whose rights are fixed by the act, without running afoul the act itself. The estate is not personally liable for a deficiency under the mortgage should there be one, but a supersedeas bond could possibly make it so, notwithstanding the trustee obviously has no power or authority to assume an indebtedness on behalf of the estate which it would not otherwise owe. A supersedeas bond in a mortgage foreclosure is fixed at an amount sufficient to cover costs of the appeal and for delay if the appeal is without justification. (Omaha Hotel Company v. Kountze, 107 U. S. 378.) The theory being, as the court in that case, after an extended review of the authorities, say:

"In view of the authorities, therefore, as far as they go, if the bond in the present case is to be regarded as important nothing more than the bond prescribed by the statute, it is clear that it did not operate as security for the original decree, nor for the interest which accrued pending the appeal, nor, by consequence, for the balance of these amounts, or either of them, after applying the proceeds of the mortgaged property. The item of $530 costs unpaid by the defendants in the original foreclosure suit, came under the same head, being part of the original decree, to pay which the lands were ordered to be sold. The only ground of recovery upon the bond could be: 1, the depreciation of the property in market value pending the appeal; or 2, its deterioration by waste, or want of repair, or the accumulation of taxes or other burdens; or 3, the use and detention of the property [fol. 53] pending the appeal, that is, the rents and profits; or 4, the non-payment of the costs of the appeal, which accrued in this court; but the special verdict does not find that these costs were unpaid.

"If depreciation in market value can ever be laid as cause of legal damages on a bond in error, which we greatly doubt, it cannot be done in this case, because it is found by the special verdict that the property considerably increased in value pending the appeal. Deterioration by waste, etc., is a very different matter; but that is equally out of the question in this case, as no deterioration is shown. The defendants paid the taxes and insurance, and kept the property in repair. The principal question for consideration, therefore, is whether the plaintiffs were entitled to recover the rents and profits, or damages for the use and detention, as it is otherwise called.

"We have seen that even in ejectment, it has at least been questioned by this court whether the bond in error covers rents and profits accruing pending the writ. And yet there is a material difference between the case of ejectment and a suit for the foreclosure of a mortgage.

"The difference is this: in ejectment, the property of the land is in question, and if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar, or dollar's worth, is so much of the plaintiff's [fol. 54] property of which he is deprived. And the same is true in dower. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. This is not only the common law, but it is the express statute law of Nebraska, which declares that 'In the absence of stipulations to the contrary, the mortgagor retains the legal title and right of possession.' The plaintiff, in this case, was not entitled to possession, nor, to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing, the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him, as of right. The taking of the rents and profits prior to the sale does not

injure the mortgage, for the simple reason that they do not belong to him. Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not covered by reasonable insurance, and the like, probably might also be fairly covered by the bond. But preception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale [fol. 55] made accordingly.

"The mere delay of the sale for the purposes of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt; he has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged, in order that the proceeds may be applied to the debt. The amount due is ascertained by the decree, it is true, but only for the purpose of determining the amount of charge on the land. The debt may be prosecuted by a personal action against the debtor, and this may be the defendants in the suit or some other person. The rule of court by which a personal decree may, in some cases, be entered upon against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied, is a recent rule intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree for foreclosure and sale.

"It often happens that the debt is not fully ascertained when a decree for sale and foreclosure is made; as where there are many outstanding bonds which have to be called in and verified. The sale, in such cases, is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all which shows that a decree of foreclosure is a [fol. 56] very different thing from a personal decree or judgment for the debt.

"As it is a specific thing, the land itself, and not the rents and profits, that constitutes the pledge, the delay

of sale caused by the appeal, as before said, deprives the mortgagee of no legal right. It may be an incident of disadvantage or inconvenience, but in our judgment it is not a legal damage contemplated by the appeal bond. We are aware that a contrary view has sometimes been taken at the circuit; but upon a full consideration of the subject, we have come to the conclusion now expressed. The chances of actual deterioration and waste in certain classes of property are so great, that a bond in a considerable amount may well be required; and if actual deterioration and waste supervenes, the amount may properly be recovered.

"In addition to these general considerations, a careful examination of the 29th rule will show that in cases like the present, it does not, in terms at least, contemplate security for the use and detention of the property pending the appeal. The words are 'indemnity in all such cases (where the property in controversy necessarily follows the event of the suit) is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, etc.' 'The sum recovered for use and detention,' here referred to, means the sum recovered in the original judgment or decree, such as damages and mesne profits in ejectment, damages in dower, and replevin, etc., and the [fol 57] 'just damages for delay' refers to those damages arising from the delay occasioned by the proceedings in error or appeal which are properly a legal damage to the party delayed. We are thrown back, therefore, to a consideration of the nature of the particular case, to ascertain what those legal damages properly are. The words 'use and detention' do not assist us, as they relate to a cause of recovery in the original judgment.

"There is another consideration which relieves the conclusion which we have reached from any supposed hardship or injustice to mortgagees. Courts of equity always have the power where the debtor is insolvent, and the mortgage property is an insufficient security for the debt, and there is a good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver, and preserve not only the corpus, but the rents and profits for the satisfaction

of the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection. There is no necessity, therefore, in order to protect him from injury, that a party in order to have the benefit of an appeal, should be obliged to give security to account for the intermediate rents and profits of his own property." (Rule 29 is now Rule 33 and is the same as Rule 13 of this court.)

Is it possible that a trustee whose estate is not otherwise liable for debt, or interest, or a penalty or waste, [fol. 58] could be held therefore on an ordinary assumption of it? When we consider the law itself there is no ground, for such a view. The delay thus caused by the trustee, is a delay of the law itself, for which no one interested should suffer or gain. The estate should not be penalized for the act of the trustee in the performance of his duty and his opponent should not gain by it an advantage the act does not in spirit or tenor afford. We know of no principle of bankruptcy law under which an estate is being actually sold to pay the creditors, whereby the creditors can get damage for waste or the like, from the court of bankruptcy itself for delay, or anything else, from the bankruptcy court itself.

We suggest that as in the ordinary case of receivership, judgments against a trustee should not be executed upon property of the trustee, but certified to the court having custody of the property for observance. This done, no supersedeas would be necessary, for it must be assumed the court having such custody will do its duty. The creditor is certainly not entitled to additional security for his claim simply because of the appeal.

The foregoing general observations as to the nature and character of a supersedeas, and as to the trustees position make it clear that even without the significant mandate of Section 48b it is doubtful if a bond to stay a decree appealed from by a trustee should or could be required. [fol. 59] When, however, we consider that section in conjunction with the other sections quoted above, relative to bonds on appeal, it is perfectly clear that the trustee should be treated as being within the excepted classes named. He appeals, not so much in his own right, as to

vindicate and secure an enforcement of the mandates of the bankruptcy act. His office requires it, as much so as though he were the Comptroller of Currency, Secretary of the Treasury, of State, the Attorney General, or any other Governmental Department head. His office places him in the position of an agent of the Government for the enforcement of the Bankruptcy Act. And the enforcement of that law is as much a part of the plenary power and duty of the government as any other. The trustee's office is created for that purpose, with as much dignity attaching to it as to any other office of the government, so far as Congress has treated or could treat it. Section 870 of Title 28 exempts governmental agencies from the operation of Section 869 and 874. Receivers of Federal courts are exempt under its provisions. Central Trust Co. v. St. L., etc., R. Co., 41 Fed. 551; Pepper v. Bank, 125 Fed. 822; Bank v. Mixter, 114 Fed. 463, although the contrary has been held by a New York circuit court. Peatt v. Advance, 90 Fed. 772. The trustee is under the same head. And, when we consider Title 11, Section 48b, which clearly exempts him from giving "bond" on appeals or writs of error, in the light of the purposes of the act as a whole, [fol. 60] and in connection with Title 28, Section 869, 870 and 874, there is no escape from the conclusion that the trustee is exempted from giving any sort of bond whatsoever. To say he need not give a bond for costs, but must give a supersedeas bond under this section is a contradiction of the Statute. There are only two classes of bonds on appeal. Neither is jurisdictional, as held in Rederiaktiebolazet Amie v. Transp. Company, 245 Fed. 282, and Omaha Hotel Company v. Rountze, supra. Both classes of bonds are the subject of all three of the Sections of the Judiciary Article (869, 870, 874). To require one and not the other, therefore, creates an irreconcilable conflict.

That this court has authority to entertain this motion is of course undoubted. See Rederiaktiebolazet Amie v. Transp. Company, 245 Fed. 282, and cases cited, (cert. den. 246 U. S. 675, approved Oehring v. Fox, 266 Fed. 682, and 28 U. S. C. A., Section 874) where it is held the court has power to fix supersedeas bonds after the appeal is

perfected, which would imply the power to grant a supersedeas or stay, where no security therefor is required.

A sale of the lands involved in this matter, passing title as it does to the purchaser, would perhaps leave a moot question for final decision. It would seriously injure the unsecured creditors, should appellant prevail. The sale will no doubt be a poor one anyway with the appeal pend-
[fol. 61] ing. The court having the cause before it should, we earnestly insist at all events, exercise its inherent power to stay the sale and enforcement of the decree appealed from, until the coming down of the mandate.

Respectfully submitted.

G. L. Grant, William R. Watkins, Attorneys for Appellant.

(File endorsement omitted.)

[fol. 62] In United States Circuit Court of Appeals

Brief of Appellee on Motion for Supersedeas—Filed April 23, 1929

The appellant has filed in this Court a motion to stay the decree of the lower court and to supersede same by reason of the appeal. The same motion was denied by the District Court for the Western District of Arkansas from whence comes this appeal.

A good many authorities are cited in the printed brief which within the past two or three days has just been served on counsel for the appellee, under the contention raised by the appeal that the foreclosure proceedings involved herein could not be prosecuted by the appellee without the consent of the bankruptcy court for the northern district of Texas, although the appellee has filed no claim with the trustee in bankruptcy of the Cunningham estate, and the land covered by the lien of the appellee amounting to more than $66,000.00 is all located within the jurisdiction of the Federal Court for the western district of Arkansas, and the appellant having entered his appearance in that Court and sought to invoke its jurisdiction.

The difference between the cases cited in the brief of appellee on this question is that those were ancillary proceedings in bankruptcy and the lien was created after bankruptcy, whereas, the lien in this case was created many years before the appointment of the trustee in bankruptcy of the Cunningham estate, but the only question involved in this hearing is as stated by counsel for appellant, "Can a trustee in bankruptcy appeal and have a stay of the judgment, without giving the supersedeas bond?" And where the lower court has denied the supersedeas by reason of the appeal, can this Court grant the supersedeas? It is our contention that the trustee in order to obtain a supersedeas to stay the decree of foreclosure of the lower court, must [fol. 63] give the bond as required by law.

The appellant relies upon Section 48 (B), Section 870, Title 28, of the Bankruptcy Act. We contend that this provision of the Bankruptcy Act has no application to a trustee taking an appeal from an adverse decision, and seeking to supersede a judgment against him, without his giving the bond.

We think that the case of Pacific Coast Casualty Company v. Harvey, 250 Fed., 952 from the Ninth Circuit Court of Appeals, settles this proposition, and it is the only decision that we find directly on the question involved here. In that case the Court said:

"The errors specified are: (1) That under section 25c of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 533, Comp. St. 1916, 9609, a trustee in bankruptcy is not required to give bond when he takes appeal or sues out writ of error, and that the order requiring the trustee to give bond "as a condition" to allowing his appeal was in contradiction of the statute; and (2) That, when appeal from the decision of the Circuit Court of Appeals was taken by the trustee, there was no judgment in existence against him upon which an execution could issue, in that the judgment of the District Court was in his favor, and was not reversed until after the whole case had been heard and decided by the Supreme Court, and that as a consequence the bond given could not operate as a supersedeas, as there was no possibility of a writ of execution issuing against the trustee until after his appeal had been finally determined.

"Appellant evidently misunderstands the situation when he assumes that the court required the trustee in bank- [fol. 64] ruptcy to give bond as a condition to allowing his appeal. The court allowed the appeal as prayed, and also ordered: 'That this shall operate as a supersedeas on the petitioner'd filing a bond in the sum of $5,000.00.'"

"It is true that under section 25c of the Bankruptcy Act the trustee was not required to give bond when he took the appeal or sued out writ of error; but a supersedeas pending the appeal, though an auxiliary, was a separate matter. The appellate court could undoubtedly have reviewed the proceedings, even though appellant had failed to give any bond to supersede the proceedings on a judgment or decree entered against him. Logan v. Goodwin, 104 Fed. 494, 43 C. C. A. 658. Revised Statutes, 1000 (Comp. St. 1916, 1660), is the general provision on appeal, for costs and damages, or for costs only, according to whether or not supersedeas is obtained; but we do not think that section 25c, relieving a trustee in bankruptcy from giving bond on appeal or writ of error, relieves him from the obligation to give such a bond as is required (Revised Statutes, 1000, 1007 Comp. St. 1916, 1660, 1666) of any litigant where supersedeas is desired. In re Barrett (D. C.) 132 Fed. 362. But the order of the District Judge who allowed the appeal imposed no condition with respect to the appeal. The trustee, however, was given the right to have a supersedeas, if he chose to avail himself of such right, by giving the bond specified. McCourt v. Singers-Bigger, 150 Fed. 102, 80 C. C. A. 56."

The above case cited in that opinion, McCourt v. Singers-Bigger, 150 Fed. 102, from this Circuit, lays down the rule [fol. 65] at length as to how a supersedeas may be obtained, i. e. by giving the bond required by statute.

No judgment in this case was taken against the trustee in bankruptcy. No judgment was sought. The judgment or decree of foreclosure is simply against the land. To stay the proceedings in this case until the final termination of this appeal would result in possible great financial loss to the appellee. The sale is already advertised for the 5th of May. The cost of this advertising amounts to several

hundred dollars. Again: the taxes are due and have not been paid for this year and are now a lien against the lands superior to the mortgage of the appellee or any claim in the equity in favor of the trustee. The trustee has no money with which to pay taxes or to pay costs.

Respectfully submitted.

Duty & Duty, Attorneys for Appellee.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Granting Supersedeas, Etc.—April 23, 1929

On this the 23rd day of April, 1929, came on to be heard the motion of the appellant for a stay of the sale of the property involved in this suit fully described and set forth in the decree appealed from, the appellant and appellee appearing by counsel and the court having heard and considered said motion;

It is Ordered that proceedings for the enforcement of said decree and the sale of said property be and the same [fol. 66] are hereby stayed on condition that the appellant shall on or before the 4th day of May, 1929, present and secure the approval of the United States District Judge of the Western District of Arkansas of a bond payable to the appellee in the sum of $3,500.00, conditioned that if the appellant shall not finally prevail herein he shall pay the appellee the amount of costs of sale incurred including costs of advertising the same and the master's fees and shall also pay all interest that may accrue on the indebtedness described in the decree appealed from and the judgment thereon after May 6, 1929, until the final termination of this cause and the final sale of the property herein involved and a confirmation thereof by the District Court of the United States in and for the Western District of Arkansas, if said real estate involved in this cause shall not sell under the decree of said District Court of the United States for the Western District of Arkansas, already entered herein for an amount sufficient to pay the sums for which said bond is made to cover.

This order is without prejudice to the appellee to apply for additional security, provided there be no final determination, within six months hereafter, of the validity of the order from which this appeal is taken.

Dated this 23rd day of April, 1929.

[fol. 67] In United States Circuit Court of Appeals

Praecipe for Transcript of Record—Filed April 14, 1930

Wm. R. Watkins, Attorney at Law, 703 Electric Bldg., Fort Worth, Texas

April Eleventh, 1930.

Mr. E. E. Koch, Clerk U. S. Circuit Court of Appeals, Saint Louis, Missouri.

Dear Mr. Koch:

Re Isaacs, Tr., vs. Hobbs Tie & Timber Co., No. 8584

In the above case, after considering the certificate from your Court to the Supreme Court, I have decided to move the Supreme Court to require the entire record and cause to be taken up.

Will you please, therefore, send me a certified transcript of the record in your Court, including the following?

1. The original transcript of record,

2. My motion before your Court for supersedeas or stay.

3. The Court's order entered thereon at Kansas City, on April 23, 1929, and

4. The reply to my motion filed by Hobbs Tie & Timber Company.

If the cost deposit you have in your possession is not sufficient to cover the cost of this certified transcript, advise me and we will be glad to make an additional deposit.

[fol. 68] I wish you would send me, also, as many of the printed copies of the record as you can spare, in order that I may not have to print the record for the purpose of the motion. The rules require nine copies and I have a

few here that I can use if you will let me have as many as you can spare.

Very truly yours, Wm. R. Watkins.

WRW b.

[File endorsement omitted]

[fols. 69 & 70] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 71] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION TO BRING UP ENTIRE RECORD AND CAUSE—May 19, 1930

On consideration of the motion for a writ of certiorari to bring up the entire record and cause,

It is now here ordered by this Court that the said motion be, and the same is hereby, granted.

Endorsed on cover: File No. 34,926. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 72. B. K. Isaacs, as trustee in bankruptcy of the estate of Henrietta E. Cunningham, bankrupt, vs. Hobbs Tie & Timber Company. (Certificate.) Filed April 5, 1930. File No. 34,926.

FILE COPY

APR 28 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

—o—

No. ~~795~~ 72

—o—

B. K. ISAACS, AS TRUSTEE IN BANKRUPTCY, OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT, *Appellant*,

vs.

HOBBS TIE & TIMBER CO., A CORPORATION, *Appellee*.

—o—

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

—o—

MOTION TO BRING UP THE ENTIRE RECORD AND CAUSE

—o—

WILLIAM R. WATKINS,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 795

B. K. ISAACS, AS TRUSTEE IN BANKRUPTCY, OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT, *Appellant*,

vs.

HOBBS TIE & TIMBER CO., A CORPORATION, *Appellee*.

MOTION TO BRING UP THE ENTIRE RECORD AND CAUSE

Comes now B. K. ISAACS, appellant in this cause in the United States Circuit Court of Appeals for the Eighth Circuit, which is now pending in this Court on a question certified by said Circuit Court of Appeals, and respectfully moves that this Honorable Court issue its writ of certiorari commanding that Court to certify and send to this Court a true and complete transcript of the record in this cause.

A certified transcript of the record, together with nine printed copies, have been lodged with the clerk of this Court as exhibits to this motion.

STATEMENT

September 27, 1921, J. L. Cunningham gave a $79,000.00 note due October 1, 1924, to the Holland Banking Company, securing the payment thereof by a mortgage on 12,000 acres of timber land, and an abandoned railroad, situated in three counties in the Western district of Arkansas. (R. 11.) Cunningham died in May, 1924, leaving his entire estate, by will, to his wife, Henrietta E. Cunningham (R. 21). Cunningham and his wife conveyed the land to T. P. Perkins, in April, 1924, in trust, to enable Perkins to sell it. September 14, 1928, Mrs. Cunningham having been adjudicated a bankrupt, B. K. Isaacs was appointed as Trustee of her estate by the United States District Court for the Northern District of Texas, at Fort Worth. (R. 21-22.) The mortgaged land in Arkansas was duly scheduled in bankruptcy schedules filed August 20, 1928, and the trustee, upon his appointment and qualification, entered into possession of said premises (R. 22); on October 17, 1928, Perkins, reciting his trust and the desire of the bankrupt that said property be transferred to her trustee, conveyed the property to B. K. Isaacs, as Trustee in Bankruptcy of Mrs. Cunningham, the deed to that effect having been recorded October 29, 1928 (R. 22).

The aforementioned note was transferred by the Holland Banking Company to the Hobbs Tie & Tim-

ber Company, the appellee, December 7, 1928. (R. 11.) The present suit was instituted five days later in the Chancery Court of Benton County, Arkansas (R. 10-11). Appellant, as Trustee, was named a party defendant, and foreclosure against the mortgaged property for the amount of $62,000.00 unpaid on the note prayed for.

Appellant removed the case to the United States District Court for the Western District of Arkansas (R. 14-19) where he answered (R. 20-26), setting up the facts aforesaid, and that neither he nor the Court wherein he was appointed as Trustee, had consented to the institution of the foreclosure proceeding; that the bankrupt estate was insolvent; that the mortgaged property, consisting of 12,000 acres of land on which there is an abandoned railroad and in excess of 25,000,000 feet of uncut hardwood timber, is worth more than the $125,000, or an excess over the claim of the mortgagee of more than $60,000. That a sale, otherwise than by the Court of Bankruptcy, will result in loss and detriment to the general creditors; that a sale will embarrass and impede the due and orderly administration of the bankrupt estates; that he has not had time since his appointment to fully inspect the property and ascertain the facts in reference thereto in order to enable him to properly administer thereon. That the prevailing condition in the lumber industry is such that a forced sale at the particular time would result in a sacrifice of the property. That it would be to the best interests of the estates that he be given time and an opportunity to dispose of the property at

private sale in due course of administration, after he has obtained an accurate knowledge of the amount, quality and value of the timber, and after he has had an opportunity of putting the property on the market. That a cruise of the timber had been made but it was in possession of the plaintiff; that plaintiff has, for many years, endeavored to acquire the property; that it has long been conversant with the property—being in the tie and timber business in five states and furnishing ties and timber to the Frisco Railroad Company; that it would be unjust and inequitable to force a speedy public sale of the property, at which the plaintiff would undoubtedly be the sole bidder, and at which it would undoubtedly buy the property at an amount not in excess of the mortgage indebtedness.

That the property, being in the *custody* and *possession* of the defendant as Trustee in Bankruptcy, the Court had no jurisdiction to administer upon it or determine when or how it should be sold, or to order a sale thereof; all of such being solely and exclusively matters of administration for the Court of Bankruptcy. He also plead that he had been ordered to sell the property by an order entered September 14, 1928.

Appellee filed a motion to dismiss that part of the answer seeking to delay judgment and sale, and for judgment and order of sale on the pleadings. (R. 25-26.)

The trial court sustained the motion for judgment on the pleadings (R. 28), and thereupon entered a de-

cree of foreclosure and ordered a sale of the property by a special master (R. 37).

In his petition for appeal, appellant also sought to have enforcement of the decree stayed during the pendency of the appeal without giving security therefor (R. 38), but this was denied (R. 38-39).

The action of the Court in sustaining appellee's motion for judgment on the pleadings, in decreeing foreclosure and sale of the property, and in refusing to allow the appeal without bond for damages being posted, in order to supersede the enforcement of the decree, were the assigned errors (R. 39-40).

When the case was docketed in the Circuit Court of Appeals, appellant submitted to that court a motion for a stay of the enforcement of the decree appealed from during the pendency of the appeal without furnishing a supersedeas bond. On hearing, this motion was denied by the Circuit Court of Appeals, so that question is not subject to review.

The certificate sent up by the Circuit Court of Appeals gives us no idea as to the chronological sequence of the happenings leading up to the present controversy as revealed by the record and wholly fails to show what is shown of record as a fact that the Bankrupt estate is not liable for the payment of the note involved.

ARGUMENT

An inspection of the record will show that this motion should be granted for the following reasons:

I.

The question certified is not the real question squarely submitted by the record, and an examination of the entire record is necessary in order to ascertain this.

The question certified is as follows:

> "After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale, by the trustee, of all of the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?"

The real proposition presented for determination by the Record is as follows:

> After a Court of Bankruptcy acquires jurisdiction and possession of the the bankrupt estate, no other court has power, without consent of the former, to interfere therewith by or through subsequently instituted proceedings even to foreclose a valid pre existing mortgage and a judgment of foreclosure and sale, by another court, of a part

of the bankrupt estate in possession of the Trustee and in custody of the Court of Bankruptcy, is a nullity.

While the question certified involves a determination of the question whether or not a foreclosure proceeding (subsequent to bankruptcy) may be commenced and prosecuted to conclusion, it is limited in its scope to the question whether or not such may be done without the consent of the trustee in bankruptcy who has been ordered to sell.

The question certified is limited in its scope to those cases in which a foreclosure proceeding is instituted subsequent to the acquisition of jurisdiction by the Court of Bankruptcy while the question apparent, both from the certificate and the record, is—May such proceedings be had after the acquisition by the Court of Bankruptcy of possession as well as jurisdiction?

In this case it is vital that there be a determination of the validity of the judgment of foreclosure and sale, because if it be determined that an interference with the Trustee's possession is a nullity, he should be restored to possession. The question certified does not, in our judgment, require a determination of the validity of the judgment of the Court. The question is presented by the record.

II

The question certified is susceptible of the interpretation that there is lodged in a court in which foreclosure proceeding have been instituted to foreclose

a lien on property which is in the custody and under the jurisdiction of a court of bankruptcy, without consent of the latter court, the right to determine whether or not the foreclosure proceeding shall be entertained in view of the absence of a showing by the Trustee of due diligence in the administration of the estate. (In the Eighth Circuit there is a rule to the effect that the court of bankruptcy in which a proceeding to foreclose a valid pre-existing lien has been filed, or the Referee, or the Circuit Court of Appeals, in reviewing proceedings of the court of bankruptcy, may determine whether or not the Trustee has been properly diligent in the administration, as a basis for permitting interference with the Trustee's administration by foreclosure proceedings. See *First Trust Co. v. Baylor*, 1 Fed. (2) 24). While on the merits, it seems obvious to us that such supervisory jurisdiction is lodged exclusively in the court of bankruptcy, and not in any other bankruptcy or other court, the question is presented, and as presented, it is necessary that the entire record be brought up in order to ascertain that there was no evidence introduced on the trial of the case. The judgment was rendered on the pleadings of the plaintiff, appellee here, and the defendant, the appellant here. The motion for judgment on the pleadings was treated as a demurrer, admitting the truth of the facts alleged in the appellant's answer, which are somewhat contrary to the facts stated in the certificate in the following respects:

Appellant was appointed as Trustee in Bankruptcy herein on the 14th day of September, 1928, at Fort

Worth. (R. 21.) The 12,000 acres of timber land in Arkansas, involved herein, were held in trust for the bankrupt at the time of the adjudication, although the land was duly scheduled and on the 17th day of October, 1928, Mrs. Cunningham's Trustee conveyed the land to appellant by deed recorded on the 29th day of October, 1928, in the proper records of Benton County, Arkansas, where the principal body of the land was situated (R. 22). The State Banking Department of Missouri, which owned the note for which the land in question was mortgaged as security, procured an order from the Circuit Court of Greene County, Missouri, on the 20th day of October, 1928, authorizing the sale of the note, but it was not endorsed and delivered to the appellee until the 7th day of December, 1928. (R. 22). (See the endorsement on the note, itself, exhibited on page 11.) The instant suit was filed in the Chancery Court of Benton County, five days later. (R. 10, 11.)

It is thus apparent from the record that the Trustee had undisturbed possession for only three months of property comprising, as the certificate and record shows, 12,000 acres of timber land on which there are in excess of 25,000,000 feet of uncut hardwood timber, the exact amount of which the appellant had not been able to ascertain, because the timber cruise belonging rightfully to the bankrupt were in possession of the plaintiff. It was also admitted that this land was actually worth in excess of $125,000.00, and involved an equity on behalf of the estate in excess of $60,000.00.

On pages 23 and 24 of the record are set forth reasons why the foreclosure should not be entertained, in addition to those stated in the certificate.

III.

It is shown by the record (p. 38) that appellant requested the District Court to allow his appeal and to grant a supersedeas of the judgment of foreclosure and sale, without security; that this request was denied, to which he excepted (R. 38-39), and that this refusal was assigned as error. Also, that appellant requested the Circuit Court of Appeals to stay the enforcement of the decree without requiring him to give security therefor, and that this relief was denied except on condition that appellant would give security to pay the interest accruing on the note sued on during the pendency of the appeal. In this connection, it was made to appear to that court, on said motion, that the sale would take place on May 6, 1929, unless stayed. (See Supp. to Ptd. Record.)

The question thus arising on the record having been finally determined by the Circuit Court of Appeals adversely to the appellant should, we respectfully submit, be considered and passed upon by this Court. This is especially true as it is the only other question in the case.

The facts shown in the record and necessary in order to determine this question are as follows:

J. L. Cunningham was the maker of the note sued on. He died some years ago, leaving all of his prop-

erty, by will, to his wife, Henrietta E. Cunningham, the bankrupt. The instant suit turned out to be one wholly in rem, as none of the defendants appeared, except appellant, who was in possession of the property upon which the mortgage lien existed. The bankrupt estate was not liable for the indebtedness sued on, nor any part thereof, so that the judgment of the District Court operated directly and solely against the property.

In denying a stay of the foreclosure sale without security being furnished, the trial and the circuit courts, in effet, held that the Trustee *in possession* was bound to assume and pay a debt not owing by the bankrupt estate to hold his possession. In other words, whatever security he might have given would have resulted, in the event of an adverse determination, in the estate being compelled to pay a debt it did not owe, and this without regard to the mortgage security.

The holding of the trial court and the Circuit Court of Appeals on this question is, in effect, under the facts in this case, a requirement that the United States District Court for the Northern District of Texas, give bond, payable to the Hobbs Tie & Timber Company, in order to maintain and hold possession of the mortgaged property.

The effect of the holding of the Circuit Court of Appeals likewise was, in effect, a holding that the Trustee should obligate the estate to pay for the delay incident to the foreclosure proceeding. (See *Omaha Hotel Co. v. Kountze*, 107 U. S. 378,) where it was

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SUPREME COURT OF THE UNITED STATES

No. 72

APPELLANT'S BRIEF

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SUPREME COURT OF THE UNITED STATES

No. 72

OCTOBER TERM, 1930

—o—

B. K. ISAACS, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT, *Appellant,*

vs.

HOBBS TIE & TIMBER COMPANY, *Appellee.*

—o—

(Not Reported Below)

—o—

Appealed From the District Court of the United States, for the Western District of Arkansas, to the Circuit Court of Appeals for the Eighth Circuit, From Which a Certified Question Was Submitted and on Motion the Entire Record and Cause Was Certified to This Court.

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APPELLANT'S BRIEF

—o—

STATEMENT OF GROUNDS OF JURISDICTION

This cause was instituted by the Hobbs Tie and Timber Company in the Chancery Court of Benton County, Arkansas, on December 12, 1928 (R. 6) against the Appellant and others, to establish a debt and foreclose a mortgage lien on property in the Western District of Arkansas (R. 12).

The Appellant removed the cause to the District

STATEMENT OF THE CASE

As the cause proceeded to judgment upon the pleadings of the Appellee, and the answer of the Appellant (R. 29) the facts revealed by the pleadings will be stated in chronological order.

J. L. Cunningham executed and delivered to the Holland Banking Company of Springfield, Missouri, a note for $79,000.00, dated September 27, 1921, due October 1, 1924, bearing interest from date at the rate of 7% per annum (R. 11) and to secure the

Constructive service of process was caused to be made in accordance with the practice of the state (R. 15-16), and on the return day of the process (R. 19) Appellant, after notice (R. 17) filed his petition and bond for removal (R. 18-19) of the cause to the District Court of the United States for the Western District of Arkansas (R. 19), where he duly answered (R. 20).

It is disclosed by Appellant's answer that before this suit was filed and on September 14, 1928—more than two and one-half months before it was insti-

the owner of the note, the property was listed as an asset of the bankrupt estate in schedules filed August 21, 1925, and upon his appointment and qualification as aforesaid, the defendant entered into possession of said premises and since that time and at the present time he has been in lawful and peaceable possession thereof as Trustee in Bankruptcy aforesaid."

The estates of the bankrupts are insolvent, the indebtedness thereof exceeding $350,000.00, and assets being worth more than 50% of the debts.

The Appellant had not been able, at the time of his answer, to definitely ascertain the value of the mortgaged property, but alleged that there were in excess of 25,000,000 feet of uncut hardwood timber thereon; that the reasonable value of the property is in excess of $125,000.00, so that there is an equity for the benefit of the general creditors therein of more than $50,000.00.

That neither the Court of Bankruptcy, nor the Appellant had consented to the foreclosure of the mortgage by Appellee; that if the mortgage is foreclosed, and the property sold otherwise than in due course of administration by the Court of Bankruptcy, it will result in great loss to the general creditors; that the Bankruptcy Court has exclusive jurisdiction to administer the property; that a foreclosure sale would seriously impede and embarrass the orderly administration of the estate. That in the short time intervening since his appointment, Appellant had not been able to ascertain all the necessary facts in reference to the land in order to enable him to properly ad-

minister upon the same; that it is advisable and to the best interest of the estate that the defendant be given time and opportunity to dispose of the property at private sale in due course of administration of the Bankrupt Estate, after he has obtained knowledge of the property; that the Appellee has for a long time endeavored to acquire said property, and that under the conditions a foreclosure sale would result in a sacrifice of the property for not more than the amount of the indebtedness due on the mortgage, and that Appellee would undoubtedly be the sole bidder.

That the property, being in the custody of the Bankruptcy Court, the District Court had no jurisdiction to administer upon the same. The prayer of the answer was that the Court proceed no further with the suit than to fix the claims and liens of the various parties against the property, and that the sale be denied.

This answer was filed February 11, 1929, and it is apparent that at that time it was impossible to know whether or not the other defendants in the case would appear, so that the cause would proceed in personam.

An amendment to the answer was allowed (R.) in which it was alleged, and by force of the motion to strike the answer, admitted, that Appellant had been authorized and directed to sell the property in question, by an order of the Referee in Bankruptcy entered September 14, 1928.

A decree was entered (R. 29 to 40) sustaining the motion to strike the answer and rendering judgment in favor of Appellee on the pleadings, establishing

the amount due on the note in the sum of $66,020.65, foreclosing the mortgage lien and ordering a sale of the property by a Special Master. Appellant excfepted to the decree (R. 30), and thereafter petitioned for appeal (R. 40). He also prayed that the appeal be allowed without requiring him to furnish bond, and that the sale be stayed, pending the appeal. The appeal was allowed, but the stay denied (R. 40). At the time of filing petition for appeal, assignment of errors was filed, and with permission of the Court, at the time the appeal was allowed and the stay denied, an additional assignment was filed, challenging the refusal of the Court to stay the enforcement of the decree pending the appeal (R. 42).

Neither the District Court nor the Circuit Court of Appeals expressed an opinion on the points involved.

SPECIFICATION OF ERRORS

The assigned errors are as follows:

1. The court erred in sustaining the motion of the plaintiff to strike out and dismiss the answer of this defendant, and in thereupon entering judgment on the pleadings.

2. The court erred in ordering and decreeing the foreclosure and sale of the property in controversy herein.

3. The court erred in refusing to allow his appeal herein without bond for damages being furnished as required of other appellants in ordinary cases, in

order to supersede the operation and enforcement of the decree appealed from.

SUMMARY OF ARGUMENT

The Appellant as Trustee in Bankruptcy, under appointment of the District Court of the United States of the Northern District of Texas, was in actual possession of the property situated in Arkansas upon which Appellee sought to foreclose his mortgage at the time this suit was instituted. The possession of the Trustee is the possession of the court, and such property was therefore in the custody of the bankruptcy court.

Acme Harvester Co. v. Beekman Lbr. Co., 222 U. S. 300.
Robertson v. Howard, 229 U. S. 254.
U. S. F. & Co. v. Bray, 225 U. S. 205.
Lazarus v. Prentice, 234 U. S. 263.
Knauth Etc. v. Latham & Co., 242 U. S. 426.

Under such circumstances the District Court of the United States for the Western District of Arkansas had no jurisdiction to entertain an action to foreclose a mortgage on said property without the consent of the bankruptcy court; its decree establishing Appellee's claim against the property and ordering a sale thereof is void and a nullity.

Wiswall v. Sampson, 14 Howard 52.
Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 295.

Byers v. McAuley, 149 U. S. 608.
Wabash R. R. v. Adelbert College, 208 U. S. 38.
Hebert v. Crawford, 228 U. S. 204.
Murphy v. Hofman, 211 U. S. 562.
In Re Tyler, 149 U. S. 164.
Dayton v. Stanard, 241 U. S. 588.
Lion Bonding Co. v. Karatz, 262 U. S. 77.
Taubel, etc. Co. v. Fox, 264 U. S. 427.
Hobbs v. Head, etc. Co., 231 U. S. 692.
Metcalf v. Barker, 187 U. S. 165.
Lehman v. Gumble, 236 U. S. 448.
Davis v. Friedlander, 104 U. S. 570.
Watts v. Sachs, 190 U. S. 1.

Under 11 U. S. C. A. Sec. 48b providing that trustees shall not be required to give bonds when they take appeals or sue out writs of error, the Trustee is not required to give a supersedeas bond in order to stay enforcement of a decree appealed from, especially in a foreclosure case such as this, because a trustee cannot bind an estate in bankruptcy for the payment of any obligation, and the estate cannot be held liable for any obligation or claim, except such as are authorized by law. The Trustee should be treated as operating under the judicial department of the government, within the meaning of 28 U. S. C. A. Sections 869-870. So that, when he has appealed from an adverse decision in any case, the court rendering the same must be held to be without power to enforce its decree pending appeal, and any action taken to enforce the same pending the appeal, is void.

ARGUMENT

The points presented for determination are:

1. *As the Court of Bankruptcy was in possession and had custody of the property in question through its Trustee, prior to the institution of this suit, the District Court was without power, in the absence of consent thereto by the former court, to order a foreclosure and sale of the property.*

2. *As Trustees in Bankruptcy are not required to give bond when they take appeals, the District Court erred in refusing to stay the sale of the property under its decree pending this appeal.*

On the First Point

The Appellant in this case was admittedly in possession of the property in question at the time this suit was instituted in the Chancery Court of Benton County, Arkansas, and had been in possession thereof for sometime prior thereto. The admitted facts in respect to his possession are that he is trustee in bankruptcy of Henrietta E. Cunningham, and the property was listed as belonging to her in schedules filed in the bankruptcy proceeding in the Northren District of Texas in August, 1928. The property was conveyed to him by T. P. Perkins, who held the legal title to the property and possession thereof for the bankrupt, in October, 1928. The bankruptcy court had authorized and directed Appellant to sell the property, either subject to or free of liens, as might be advisable, and

it is admitted that at all times since the adjudication in bankruptcy in the Northern District of Texas, he had been in actual and peaceable possession of said property as Receiver and Trustee in Bankruptcy, under appointment of the District Court for the Northern District of Texas. These were the conditions existing in respect to the property at the time Appellee instituted this suit in the Chancery Court of Benton County, Arkansas, against Appellant and others on December 12, 1928, to establish his claim against the land, evidenced by the note which had been executed by J. L. Cunningham, deceased, and secured by a mortgage given on the property many years prior to the time Appellee acquired the note—five days before the suit was filed.

It is perfectly clear that if the possession of Appellant was the possession of the Court of Bankruptcy appointing him, the decree of the District Court and all acts under it, are nullities; for, if the District Court of the United States for the Northern District of Texas had possession and custody of the land in question, at the time this suit was brought, it was thereby effectively and conclusively withdrawn from the jurisdiction of every other court during the time the Bankruptcy Court retained jurisdiction of it. That his possession is that of the District Court for the Northern District of Texas, has been decided here many times.

On the whole, it is certain that the primary object of the Bankruptcy Act is to draw to the custody and

control of the Court of Bankruptcy in which proceedings are begun, all property of the bankrupt, wheresoever it may be situated, for the purpose of being reduced to money and distributed among his creditors.

In *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, bankruptcy proceedings were pending against the Acme Harvester Company in the Northern District of Illinois, when a suit was filed in Missouri to recover on a debt. An attachment was issued in the suit and levied upon money owing the bankrupt. In speaking of the effect of the bankruptcy proceeding on the attempt to thus attach property of the bankrupt, this Court in the course of its opinion, said:

> "Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in Mueller v. Nugent, 184 U. S. 1, where it is said, 'it is as true of the present law as it was of that of 1867, that the filing of the petition is caveat to all the world, and, in effect an attachment and injunction. International Bank v. Sherman, 101 U. S. 403, and on adjudication, title to the bankrupt's property became vested in the Trustee (Secs. 70, 21E —11 U. S. C. A. 110, 44E), with actual or constructive possession and placed in the custody of the Bankruptcy Court'—it is none the less certain that an attachment of the bankrupt's property, after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the Bank-

ruptcy Court for the purpose of administration under the Act of Congress.

"It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. It is true that under Sec. 70a of the act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt; but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. Paragraph 5, Sec. 70a, in reciting the property which vests in the trustee, says there shall vest 'property which, prior to the filing of the petition (the bankrupt) * * * could by any means have transferred or which might have been levied upon and sold under judicial process against * * * (the bankrupt).' Under Sec. 67c attachments within four months before the filing of the petition are dissolved by the adjudication in the event of the insolvency of the bankrupt, if their enforcement would work a preference. Pro-

vision is made for the prompt taking possession of the bankrupt's property, before adjudication, if necessary (Sec. 69a). Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purposes of the act. These provisions, and others might be recited, show the policy and purpose of the bankruptcy act to hold the estate in the custody of the court for the benefit of creditors after the filing of the petition and until the quetsion of adjudication is determined. To permit creditors to attach the bankrupt's property between the filing of the petition and the time of adjudication would be to encourage a race of diligence to defeat the purposes of the act and prevent the equal distribution of the estate among all creditors of the same class, which is the policy of the law. The filing of the petition asserts the jurisdiction of the Federal court, the issuing of its process brings the defendant into court, the selection of the trustee is to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. Pending the proceedings the law holds the property to abide the decision of the court upon the question of adjudication as effectively as if an attachment had been issued, and prevents creditors from defeating the purposes of the law by bringing separate attachment suits, which would virtually amount to preferences in favor of such creditors. See in this connection the well-considered cases of State Bank v. Cox, 74 C. C. A. 285, 143 Fed. 91 (C. C. A. Seventh C); Shawnee County v. Hurley (C. C. A. Eighth C), 90 C. C. A. 362, 169 Fed. 92, 94.

"It follows that, if the bankruptcy proceedings were pending, so that the bankruptcy court ac-

quired jurisdiction over the estate, it was error for the state court to proceed to a judgment and appropriation of the property on the attachment suit of a single creditor."

In *Robertson v. Howard*, 229 U. S. 254, there was drawn in question the power of the bankruptcy court to sell property situated beyond its territorial limits. The bankruptcy proceeding was pending in Illinois, and the land was in Kansas. The Supreme Court of Kansas had held that the sale by the trustee was void. This Court said:

"This, however, but amounts to holding that a court of bankruptcy is confined in the administration of the property of a bankrupt to state or district boundaries, and that whenever the bankrupt has property within two or more states, it is necessary to commence independent or ancillary proceedings in all such states in order to subject the property therein to administration and sale. But we think it is clear that this view is incompatible with the bankrupt act of 1898. (30 Stat. at L. 544, Chap. 541, U. S. Comp. Stat. 1901, p. 3418.) No analysis of the text of the act, we think, is necessary to demonstrate this result, since it is elementary and has been decided over and over again that the effect of the adjudication in bankruptcy is to transfer the title of the property of the bankrupt and vest the same in the trustee, who has the right, under the control and authority of the court to administer the same.

"No limitation on this general principle arises from the mere fact of the particular situation of the property, as the principle is general and em-

braces all the property of the bankrupt estate, wherever situated. Indeed, this view was accepted by the court below and made the basis of its ruling, since, in considering whether the quit-claim deed was valid, it held it to be void because the title to the property which it embraced remained in the trustee in bankruptcy—a view which necessarily demonstrates that the ruling as to the invalidity of the sale made in the bankruptcy proceedings rested upon the conception that although the property passed to the trustee and was subject to administration, nevertheless the court was without power to direct the sale of the property, because it was located in another state. But, in discussing the jurisdiction vested in a court of bankruptcy, in United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 217, it was said:

" 'We think it is a necessary conclusion from these and other provisions of the act, that the jurisdiction of the bankruptcy courts in all "proceedings in bankruptcy" is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them.'

"The court of bankruptcy in Illinois therefore acquired full jurisdiction over the land in question upon the filing of the petition in bankruptcy. Having such jurisdiction, it possessed the power

to order a sale of the certificates or of the interest in the land evidenced by them. The legal title to the certificates being in the trustee, and he being within the jurisdiction of the court, and subject to its orders, that tribunal could lawfully exert its powers over him, without regard to where the land was situated. Even if the enlarged powers of a court of bankruptcy over the estate under its control be put out of view, and the subject be looked at as a mere question of equitable jurisdiction, it may not be doubted that a court of equity in one state in a proper case could compel a defendant before it to convey property situated in another state. Fall v. Eastin, 215 U. S. 1, and cases cited. There being thus ample power in the court, it follows, of course, that resort to ancillary proceedings was unnecessary. The decision in Babbitt v. Dutcher, 216 U. S. 103, to the effect that district courts other than the court in which original proceedings in bankruptcy are instituted possess power in proper cases to exert ancillary jurisdiction in aid of the court in which the bankruptcy proceedings are pending lends no support to the contention that the court which had full power could not exert its ample authority without invoking the ancillary power of another and different court."

The language above quoted from the opinion in *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, was employed in a case in which the bankruptcy proceeding was pending in the district court, when an equity suit seeking to control the administration of the fund in the possession of the trustee in bankruptcy, was instituted in the circuit court for the

same district. In that case it was contended on behalf of the plaintiffs that the rights of the parties in the fund should be fixed and apportioned by the court; that a lien be declared thereon; that no claims of the Trustee be allowed against the same, and that the Trustee be directed to pay the money in accordance with the decree, and be enjoined from taking any other action in the matter. The court of bankruptcy prior to the institution of the suit granted leave to the plaintiffs in the suit to bring the same in the Circuit Court. The Trustee, however, challenged the jurisdiction of the Circuit Court, and in holding that the challenge to the jurisdiction was well taken, the Supreme Court says:

> "An examination of the bill discloses that its primary purpose is to obtain an adjudication of certain claims presented against the estate of the bankrupt, now in the course of administration in the bankruptcy court, and of the priority to be accorded to them in the distribution of a fund belonging to the estate and now in the control of that court. That this fund arose in the due administration of the estate, is lawfully in the custody of the bankruptcy court, and is awaiting distribution among such of the creditors as are entitled to participate therein, is a necessary conclusion from the allegations of the bill, and is conceded. The complainant does not assert a title to it, but at most only an equitable right to have it applied to just claims for labor and materials, for which the complainant is liable as the bankrupt's surety under the act of August 13, 1894, supra. The real controversy is over the merits of some of those claims, the right of the present

holders to assert them for their full amount, and the priority to be accorded them in the distribution. By an intervening petition in the bankruptcy proceeding the complainant voluntarily submitted its asserted equitable right to the court of bankruptcy for determination, and the matter is now pending before the referee. But by the present plenary bill in equity it is sought to take from the bankruptcy court the adjudication of the claims in question and the decision of what priority shall be accorded them. The circuit of appeals holds that this cannot be done consistently with the bankruptcy act, and the correctness of its holding is the principal question presented by this appeal.

"We are not here concerned with a suit by a trustee to recover property in the possession of another who claims it adversely, nor with a suit against a trustee to recover property in his possession, claimed by another, and therefore the jurisdictional questions incident to suits of that character need not be considered. But we are concerned with a suit against a trustee, the purpose of which is to control the distribution of a fund in his possession, admittedly belonging to the bankrupt's estate, and to determine to what extent and in what order the several creditors shall participate therein.

"Section 2 of the bankruptcy act invests courts of bankruptcy 'with such jurisdiction *at law and in equity* as will enable them to exercise original jurisdiction in *bankruptcy proceedings*, * * * to * * *

(2) " 'Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; * * *

(6) "'Bring in and substitute additional persons or parties in *proceedings in bankruptcy* when necessity for the complete determination of a matter in controversy;

(7) "'Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * *

(13) "'Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; * * *

(15) "'Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.' (30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1491.)

"And the section concludes by saying: 'Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.'

"Section 23a provides: 'The United States circuit courts shall have jurisdiction of all controversies at law and in equity, *as distinguished from proceedings in bankruptcy*, between trustees as such and *adverse claimants*, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings has not been instituted, and such controversies had been between the bankrupts and such adverse claimants.'

"And Par. 57k reads: 'Claims which have been allowed may be reconsidered for cause, and re-

allowed or rejected in whole or in part, according to the equities of the case, before, but not after, the estate has been closed.'

"WE THINK IT IS A NECESSARY CONCLUSION FROM THESE AND OTHER PROVISIONS OF THE ACT THAT THE JURISDICTION OF THE BANKRUPTCY COURTS IN ALL 'PROCEEDINGS IN BANKRUPTCY' IS INTENDED TO BE EXCLUSIVE OF ALL OTHER COURTS, AND THAT SUCH PROCEEDINGS INCLUDE, AMONG OTHERS, ALL MATTERS OF ADMINISTRATION, SUCH AS THE ALLOWANCE, REJECTION, AND RECONSIDERATION OF CLAIMS (THE REDUCTION OF THE ESTATES TO MONEY, AND ITS DISTRIBUTION, THE DETERMINATION OF THE PREFERENCES AND PRIORITIES TO BE ACCORDED TO CLAIMS PRESENTED FOR ALLOWANCE AND PAYMENTS IN REGULAR COURSE, AND THE SUPERVISION AND CONTROL OF THE TRUSTEES AND OTHERS WHO ARE EMPLOYED TO ASSIST THEM.

"The allegations of the bill, other than those relating to the actions brought against the complainant in Pennsylvania, and to its contingent claim against the indemnitor banks, are intended to invoke (1) a reconsideration and modification of the referee's order of November 19, 1904, allowing certain claims as preferred claims for labor and materials, (2) a determination of the right of the present holders of those claims to have them rated and paid at their face value, (3) an inquiry into the charge that the trustee and others who were employed to assist him in the management of the estate have been speculating

in claims against it, and procuring or acquiescing in their improper allowance and classification, and (4) a direction that the just claims for labor and materials be accorded a preference in the distribution. These matters are rightly subjects for proceedings in bankruptcy, and therefore fall within the exclusive jurisdiction of the court of bankruptcy. A distinct purpose of the bankruptcy act is to subject the administration of the estate of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks.

" 'Of the fact that the suit was begun in the circuit court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender the exclusive control over matters of administration, or to confide them to another tribunal."

In *Lazarus v. Prentice*, 234 U. S. 263, bankruptcy proceedings were instituted in New York, and an ancillary proceeding was shortly thereafter instituted in the Federal Court in Louisiana, where a temporary receiver was appointed to take charge of the assets in that state. It was held that the filing of the bankruptcy petition brought the property of

the bankrupt wherever situated into custodia legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. It was also held that any attempt to secure a right in the property by subsequent proceedings or assignments was a mere nullity, properly disregarded by the bankruptcy Court. It was also held that any claim to the property in question must be asserted in the court of original jurisdiction, and could not be adjudicated by intervention in the ancillary proceeding.

In *Knauth, etc., v. Latham & Company*, 242 U. S. 426, an attempt had been made by way of cross-action in a suit by a Receiver in Bankruptcy to impress a trust upon certain property involved in the case. It being apparent that the cross-bill was an attempt to obtain priority of payment on account of money fraudulently obtained by the bankrupt, and put into their business, it was held that the Federal Court for the Southern District of Alabama could not entertain the cross-bill because the estate of the bankrupt was being administered in the Federal Court for the Northern District of Alabama. The same ruling was made in two companion cases reported with the principal case.

To achieve the foregoing object, it is apparent that state lines and district boundaries are eliminated. The

title and possession of a trustee in bankruptcy of property not adversely claimed, is that of the court whose officer he is.

Mueller v. Nugent, 184 U. S. 1.
Whitney v. Wenman, 198 U. S. 539.

In the former case, the court said:

> "On adjudication, title to the bankrupt's property became invested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court."

So that in matters of administration, jurisdiction of the court of bankruptcy of property of the bankrupt in possession of the trustee is paramount and exclusive.

Knauth, etc., v. Latham & Co., 242 U. S. 426.
U. S. F. & G. Co. v. Bray, 225 U. S. 205.
Lazarus v. Prentice, 234 U. S. 263.

The general rules applicable alike to all courts which have custody of property or a fund, are applicable.

Dayton v. Stanard, 241 U. S. 588.
Murphy v. Hofman, 211 U. S. 562.

In the latter case, above cited, this Court said:

> "But where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle not peculiar to courts of bankruptcy, but applicable to all courts, Federal or state."

It is true the bankruptcy courts have jurisdiction only within their territorial limits, but as we have seen, this is no obstacle to the administration of the estate under the Act, by the court in which the primary proceedings are pending, where property belonging to the estate is situated within the territorial limits of another court of bankruptcy. All such property is in the custody of the primary court of bankruptcy for the purposes of administration. (See the authorities hereinbefore cited.) That court alone, may determine liens and claims against the same or permit such to be determined elsewhere, and it, alone, may determine when and under what conditions such property may be sold by its trustee. The trustee cannot surrender possession of any property in his possession to any other court, without the consent of the court that appointed him, for his possession is that of the Court.

In *Whitney v. Weinman*, 198 U. S. 539, the Court said:

> "It is insisted that in the present case as the property was voluntarily turned over by the receiver, thereby the jurisdiction of the district court, upon the ground herein stated, is defeated as the property is no longer in the possession or subject to the control of the court. But the receiver had no power or authority under the allegations of this bill to turn over the property. * * * the court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien thereon or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property

by a receiver and without the authority of the Court."

Even the court in which proceedings in bankruptcy are pending, cannot grant authority to another court to conduct proceedings in bankruptcy in respect to property in its custory.

U. S. F. & G. Co. v. Bray, 225 U. S. 205.

There is no question but that if the property involved here was situated in the Northern District of Texas, proceedings taken by Appellee, without consent of the bankruptcy court of that district, to foreclose its mortgage would be void. (See the authorities cited on pages 46-53 and 96-99 hereof.)

There is nothing in the Bankruptcy Act that implies that the custody of the bankruptcy court of property out of the district in which the proceedings are pending, is of any different degree or character than that which it has of property in the district, in so far as the administration thereof, under the Act, is concerned.

Lazarus v. Prentice, supra.
Knauth v. Latham & Co., supra.
U. S. F. & G. Co. v. Bray, supra.

It would, indeed, be a anamolous situation if the undoubted jurisdiction and power of the primary court of bankruptcy to administer on property of a bankrupt, wheresoever situated, was so limited in its nature and scope that it could not at the same time examine and ascertain the nature and extent of liens and claims against the same, and to sell it either sub-

ject to or free of such claims as it found existed, as fully to all intents and purposes as though the property were in the district. The court in which the proceedings in bankruptcy are pending, is not compelled to resort to ancillary proceedings in order to sell property situated in another state.

Robertson v. Howard, 229 U. S. 254.

The ancillary jurisdiction of courts of bankruptcy within their territory limits to "aid" a receiver or trustee appointed in a proceeding in another court of bankruptcy (11 U. S. C. A. Sec. 11, Subd. 20), extends only to the giving of such "aid" as will render effective the aforesaid objects of the Act. It is not for such courts, in the exercise of this ancillary jurisdiction to act in opposition to the jurisdiction or authority of the court in which the proceedings in bankruptcy are pending. They have no power in proceedings brought by a trustee for the purpose of securing aid in obtaining or maintaining possession, to entertain any proceedings by cross action, or otherwise, that seeks to control the administration of such property by the court in which such proceedings are pending. Re Patterson Lbr. Co., 247 Fed. 578, per Sanford, District Judge. See infra, p. 94.

In *Knauth v. Latham*, supra, in which an attempt was made to impress a lien on property of the bankrupt being administered in another district, by way of cross action in a suit brought by the trustee to recover the property, this Court said:

> "Manifestly such a proceeding could not be entertained in the Southern District of Alabama.

The estate was being administered in another court."

Lazarus v. Prentice, supra, pp. 22-23.

As the district court proceeded to order a sale of the property in question by a special master, and in allowing this appeal refused to stay proceedings for the sale pending the final disposition of the appeal; and, as the Circuit Court of Appeals, likewise, refused to stay the sale, except on condition that Appellant file a bond binding the bankrupt estate absolutely to pay interest accumulating on the debt during the pendency of the appeal, which bond Appellant did not file, it may be assumed that the district court proceeded to carry out its decree. In such event, in fact, in any event, it is of vital importance and indispensable to the disposition of the cause that the legal effect of the decree and sale be determined. If the decree of the district court is simply erroneous, the Appellant is left in a rather embarrassing position, but if it is an absolute nullity, as we contend, then the sale under the decree, passed no title to the purchaser, and the property remains in the custody of the Trustee.

The earliest case in this Court in which the nature of the jurisdiction of the court of bankruptcy was mentioned, arose under the Bankruptcy Act of 1841, in *Ex Parte The City National Bank of New Orleans*, 3 Howard 292. In that case an application was made to this Court on behalf of the Bank against the District Court of the United States for the District of Louisiana, to prohibit it from proceeding to hear a

complaint made against the bank by a Trustee in Bankruptcy. After bankruptcy the bank had proceeded in the state courts without the consent of the Bankruptcy Court, to foreclose a mortgage on certain property of the Bankrupt. The Trustee contended the Bankruptcy Court had exclusive jurisdiction, and, in an opinion by Mr. Justice Story, his contention was sustained. The provision of the Act of 1841, saving liens, mortgages and other securities from impairment by the Bankruptcy proceedings, was construed, and it was held that this provision did not, and could not interfere with the jurisdiction and right of the District Court in which the Bankruptcy proceeding was pending, to inquire into and ascertain the validity and extent of such liens, mortgages and other securities, and to grant to the same remedial justice as the state courts might or ought to grant.

On the other hand, under the same Act, the Court held, in *Nugent v. Boyd*, 3 Howard 426, that where a suit to foreclose a mortgage was instituted prior to the filing of the Bankruptcy proceeding, the state court had authority to proceed to final judgment and to sell the property independent and without the consent of the Court of Bankruptcy.

The power of the Courts of Bankruptcy to decree a sale of mortgaged property of the Bankrupt, either subject to or free of liens, and to apportion the proceeds, if there were more than one mortgage or lien, was first sustained in *Houston, et al., v. The City Bank of New Orleans*, 6 Howard 486.

In *Peck v. Jenness*, 7 Howard 612, which arose

under the Bankruptcy Act of 1841, prior to bankruptcy an attachment was levied on certain property of the Bankrupt in an action in a state court. Under the Bankruptcy Act of 1841, the attachment was not avoided by virtue of the bankruptcy proceedings, but the Court of Bankruptcy, on petition of its assignee, held the attachment to be void. This Court held that the order of the district court was beyond its powers, saying:

> "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court * * * Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

In *Wiswall v. Sampson*, 14 Howard 52, a leading case, this Court held that where lands were in the custody of a receiver, appointed in a state court, they could not be sold by a marshal of the United States under process issued out of the United States Court, although the judgment upon which the process issued was a lien upon the lands, and the execution was levied before the receiver obtained actual possession of the property. It appeared, however, that application for the appointment of the receiver was made before the levy by the marshal. The Court said:

> "It has been argued, that a sale of the prem-

ises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court; and that the sale therefore, in such a case, should be upheld. But, in conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons, pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree and the litigation become fruitless" * * *

"We agree, that the person holding the prior legal lien or incumbrance, must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund before his legal right can be affected: and the proper way is by summons or notice upon the order or direction of the court.

"This notice can be readily given on the report of the master, of the prior liens or incumbrances resting upon the estate.

"But it is not necessary to go this length in the case before us, *as it is sufficient to say that the sale under the judgment, pending the equity suit, and while the court was in possession of the estate without the leave of the court, was illegal*

and void. We do not doubt but that it would be competent for the court, in case the judgment creditor holding the prior lien had not come in and claimed his interest in the equity suit, to decree a sale in the final disposition of the fund subject to his judgment. The purchaser would then be bound to pay it off. But this disposition of the legal prior incumbrance is a very different matter, and comes to a very different result, from that of permitting the enforcement of it, *pendente lite*, without the leave of the court. The rights of the several claimants to the estate or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title, or charges to which it may be subject.

"Neither do we doubt but that it is competent, and might, in some cases, be fit and proper for the court, where the property in dispute is ample, and the litigation protracted to permit the execution to issue, and compel the prosecuting creditor to pay off the judgment. (3 Beav. 428.) But it is manifest that these proceedings, on behalf of the prior incumbrances, should be under the control of the direction of the court, as the condition of the title to the property may frequently be so complicated and embarrassed, that unless the sale was withheld until the title was cleared up by the judgment of the court, great sacrifice must necessarily ensue to the parties interested.

This case affords an apt illustration of the remark. The marshal's sale was made under an arrangement that no money was to be paid by the purchaser, unless he succeeded in obtaining a title to the property under it. It is ob-

vious, therefore, if the purchase had been unconditional, and at the risk of the purchaser, it must have been bid off for a nominal consideration.

As we have already said, *it is sufficient, for the disposition of this case, to hold, that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise, without the leave of the court for that purpose.* And upon this ground, *we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser.*

We are also inclined to think that the question of title to the property under the marshal's sale is concluded between these parties by the judgment of the court in the proceedings on the petition by the purchaser for the removal of the receiver, and to be let into the possession. This, we have seen, is the appropriate remedy on behalf of a person claiming a paramount legal right to an estate which has been brought into the possession and safe keeping of the Court of Chancery, pending the litigation in respect to it.

This proceeding was explained by Lord Eldon in Angel v. Smith, 9 Ves. 335, speaking of the rule in respect to sequestrators, and which he held was equally applicable in the case of receivers. 'Where sequestrators,' he observed, 'are in possession under the process of the court, their possession is not to be disturbed, even by an adverse title, without leave: upon this principle, that the possession of the sequestrators is the possession of the court, and the court being competent to examine the title, will not permit itself

to be made a suitor in a court of law, but will itself examine the title. And the mode is, by permitting the party to come in to be examined *pro interesse suo;* the practice being, to go before the master to state his title, and there is the judgment of the master, and afterwards, if necessary, of the court upon it.' * * *

"The answer of Wiswall set up his right to the property under the decree in the suit against Ticknor and Day.

"The right of the petitioner, therefore, under his title to the possession of the property as against the right of Wiswall under the proceedings in equity and the decree in his favor, would seem to be a question directly involved. The court so understood the issue and passed upon it; holding, as we hold in this case, that the sale was illegal and void, having been made while the estate was in the possession and safe keeping of the Court of Chancery."

In *Peale v. Phipps*, 14 Howard 368, the decision in Wiswall v. Sampson was reaffirmed on appeal taken from an action in a Circuit Court of the United States, in which it was sought to compel the Trustees of a defunct corporation, acting under appointment of a state court, to pay over certain monies in their possession as such Trustees, to the plaintiff. The decision was that the Circuit Court of the United States had no jurisdiction to entertain the action, because the property sought to be reached by the suit was in the custody of the state court, and—

"while it thus remained in the custody and possession of that court awaiting its order and de-

cision, no other court had a right to interfere with it or wrest it from the hands of its agent, and thereby put it out of his power to perform his duty."

The decision in Wiswall v. Sampson, supra, was likewise reaffirmed in *Pulliam v. Osborne*, 17 How. 471-76, involving the question of priorities under the levy of successive executions issued out of the state and federal courts. The state levy was prior in point of time to that of the federal court execution, and this Court held that the tribunal which first acquires property by seizure, may dispose of it, discharged of claims of account of subsequent levies.

In *Taylor v. Carryl*, 61 U. S. (20 How.) 583, a vessel had been attached on process of a state court and while under such levy, it was attached and sold on a libel issued subsequently out of a federal court; it was held that the federal court had no jurisdiction, and that the sale by its marshal was inoperative and that the purchaser at the attachment sale had the title. In this case the rule of *Peck v. Jenness*, 7 How. 612, was approved and the doctrine of *Wiswall v. Sampson* was reaffirmed.

In *Yonley v. Lavender*, 88 U. S. (21 Wall.) 276, was involved the validity of two sales of real estate, one by an administrator acting under appointment of a state court, and the other under an execution sale upon a judgment rendered in a circuit court of the United States. The levy and sale under order of the circuit court having been made while the property was in custody of the state court, in the course of ad-

ministration. It was held that the levy and sale by the federal court, in disregard of the custody and jurisdiction of the property by the probate court was void and passed no title to the purchaser.

In *Barton v. Barbour*, 104 U. S. (14 Otto) 126, which was decided here before the Act of Congress authorizing the institution of suits against receivers of railroads without consent of the court in which the receivership was pending, this court held that an action would not lie against the receiver for damages on account of personal injuries sustained in the operation of a railroad by him. It was there *contended that the only consequence resulting from the failure to obtain leave to sue was that the plaintiff could be restrained by injunction or attached for contempt, but this Court held that the rule was not so limited, that the proceeding was void, and the doctrine of Wiswall v. Sampson was reaffirmed.*

In *Heidritter v. Elizabeth Oil Cloth Company*, 112 U. S. 294, the property involved had been taken into custody and sold by a marshal of the United States on process issued out of the federal court. After the marshal had levied on the property, actions were instituted in a state court to foreclose a mechanic's lien on the premises. These causes proceeded to judgment and the property was sold under order of the state court after the sale by the marshal. The instant case was between the purchasers at the two sales. This court held that the title to the property passed under the marshal's sale as against the claimant under the state court proceeding, saying:

"When, however, the proceedings were begun for the enforcement of the mechanics' liens against the premises in controversy, by the issuing of the summons and the filing of the declaration, the property over which the State Court sought to exert its jurisdiction, was in the actual custody and possession of the District Court of the United States for the District of New Jersey. It had been seized by an officer of the United States for an alleged offense against its laws. It was proceeded against as forfeited to the United States, and to declare and enforce that forfeiture judicially, it had been taken possession of by the court. This proceeding was undoubtedly in rem, *and it is quite immaterial whether the law authorized an absolute forfeiture of the res, including all interests and estates in it, so as to overreach antecedent liens and adverse claims, or only of the actual interest of the owner charged with the violations of law at the time of the alleged offenses. In either view and for either purpose, the court had taken possession of the property itself, and that possession was necessarily exclusive. The res was thereby drawn into the exclusive jurisdiction and dominion of the United States; and, for the purposes of that suit, it was, at the same time, withdrawn from the jurisdiction of the courts of New Jersey.* Any proceeding against it involving the control and disposition of it, in the latter, while in that condition, was as if it were a proceeding against property in another State. *It was vain, nugatory and void and, as against the proceedings and judgment of the District Court of the United States, and those claiming under them, was without effect.* • • •

"And the same conclusion must prevail here, for although the sale under the judgments in the

> State Court was not made until after the property had passed from the possession of the District Court by delivery to the purchaser at the sale under the decree, yet the initial step on which sheriff's sale depended, the commencement of the proceedings to enforce the mechanics' lien, asserting the jurisdiction and control of the State Court over the property sold, took place when that property was in the exclusive custody and control of the District Court; and by reason of its prosecution to a sale, was an invasion of the jurisdiction of that court. No stress is laid on the fact that notice of the proceeding, by affixing a copy of the summons upon the building, which was required by the statute, could only be made by an actual entry by the sheriff upon the property, to that extent disturbing the possession of the marshal, because the same result in our opinion, would have followed, if no such notice had been required or given. The substantial violation of the jurisdiction of the District Court consisted, in the control over the property in its possession, assumed and asserted in commencing the proceedings to enforce against it the lien claimed by the plaintiffs in those actions, prosecuting them to judgment and consummating them by a sale."

Wiswall v. Sampson was cited, approved and followed in this case, as were Peale v. Phipps, Pulliam v. Osborne, Taylor v. Carryl, Yonley v. Lavendar, and Barton v. Barbour.

In *Easton v. Gail*, 91 U. S. (1 Otto) 521, a mortgage foreclosure was commenced prior to bankruptcy. It was held by this Court that the state court could, and should, proceed to judgment without interference by the Trustee in Bankruptcy.

In *Porter v. Sabin*, 149 U. S. 473, this Court, in reasoning that a court which had appointed a receiver had the right, alone, to say whether or not an independent suit would be authorized against the receiver, and after such consent was denied, that another court had no jurisdiction to entertain the action, and thus overrule the denial of such right by the former, expressly approved and followed the doctrine announced in Wiswall v. Sampson, Peale v. Phipps, Barton v. Barbour, Pulliam v. Osborne, Heidritter v. Elizabeth Oil Cloth Co., and in re Tyler.

In *Byers v. McAuley*, 149 U. S. 608, the Federal District Court had entertained an action to distribute and wind up the affairs of the estate of a decedent, which was in custody of the state Probate Court, and in the action assumed full control of the administration of the estate. This Court, in denying the right of the District Court to act under such circumstances, said:

> "In order to pave the way to a clear understanding of this question, it may be well to state some general propositions which have become fully settled by the decisions of this court; and, first, it is a rule of general application, that where property is in the actual possession of one court, of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court. * * * 'The point of the decision in Freeman v. Howe, supra, is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive

jurisdiction of the court from which the process has issued for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court, but that all other remedies to which he may be entitled against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or Federal, having jurisdiction over the parties and the subject-matter. And, vice versa, the same principle protects the possession of the property while thus held, by process issuing from state courts, against any disturbance under process of the courts of the United States, excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States."

"Secondly. An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court, and it is a possession which cannot be disturbed by any other court."

and, in the opinion recognized the settled doctrine that on the other hand an action to establish a debt could be maintained in a court other than the one having control of the property, provided the claim thus established was certified to the court having custody of the estate, for satisfaction.

In *Moran v. Sturges*, 154 U. S. 256, a receiver had been appointed by a state court, but he had not qualified and entered into possession of the vessel involved in that case when a libel was issued by a United States court and the vessel taken in charge by the United States marshal in an admiralty proceeding which was brought to enforce a maritime lien. This Court sustained the custody of the vessel obtained by the federal court. It was pointed out that the jurisdiction of the United States courts, in admiralty was paramount and exclusive, and that, while comomn law remedies could be pursued in the state courts, yet the proceedings in the state court must be had subject to the rights and remedies available in admiralty: that if the state court had prior possession (as in Taylor v. Carryl) the state court could proceed subject to the maritime lien and when its jurisdiction had determined the admiralty court could proceed.

The rule applicable was stated by the Chief Justice as follows:

> "The contention is not only that the title to these vessels vested in the receiver as of July 31 and that, in such a case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after

the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31, and the jurisdiction of the district court was thereby ousted. But if jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of relation has no application. As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject-matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted, and unjust dispositions of the debtor's property, and to accomplish just and equitable ends. * * *

"At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession.

"The jurisdiction of the state court over the subject-matter of the winding up of the corpora-

tion and the distribution of its assets did not embrace the disposition of the claims of the libelants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the order of July 31, as mere creditors of the Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property subject to liens over which that court could not exercise jurisdiction in invitum, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the district court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the district court violated no rule of comity nor any other rule in entertaining the libels."

The foregoing rule was reaffirmed by the late Chief Justice of this Court, in practically the same language in the case of *Hankin v. Brundage*, 276 U. S. 36.

In *Shields v. Coleman*, 157 U. S. 168, the single question was presented whether a Federal Court had power to appoint a receiver and take property out of the possession of a receiver appointed by a state court, and it was held that the Federal Court had no such jurisdiction.

The error in those cases in some of the district and circuit courts (see In Re Ginesti and Duncan v. Girard, infra pp. 86, 87) in which it has been held that Courts of Bankruptcy do not acquire jurisdiction of property against which a Trustee under a deed of trust with power of sale has commenced foreclosure by advertising, where the bankrupt is actually or constructively in possession, is apparent from a consideration of the case of *Ex Parte* (Bethea), 165 U. S. 443, in which the general rule is recognized, that where property is actually in possession of one court of competent jurisdiction, such possession cannot be disturbed by another court of concurrent jurisdiction, but held it to be inapplicable in the case of a receiver of a National Bank appointed by the Comptroller of Currency.

In Wabash Railroad Company v. Adelbert College, 208 U. S. 38, the receivers had been appointed for the railroad and were in possession when a suit was brought in a state court to foreclose a mortgage against the same. After the suit in the state court was instituted, the receivers sold the property of the Company, delivered it to purchasers and were discharged. Fourteen years later, the state court case was called to trial. By the terms of the decree of foreclosure in the Federal Court, jurisdiction was retained of the entire subject-matter involved, including the claim asserted against the property in the state court proceeding. This Court held, in view of these circumstances that the judgment of the state court was void, saying

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states; they are, however, of especial importance with respect to the relation of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and unobversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and

with a spirit of respect for the just authority of the states of the Union. * * *

"It follows, therefore, that the state court was without power to decree a sale of the property, and its judgment must be reversed."

On the rehearing in that case (208 U. S. 609) it was held in effect that under such circumstances the judgment of the state court cannot be other than in rem, affecting only the property involved, the declaration of the lien is an invasion of the possession of the Federal Court, which is beyond the jurisdiction of the court.

On the other hand, the case of *Ingersoll v. Coram*, 211 U. S. 335, furnishes an illustration of the rule that where the parties are personally before the court, and the property is in the possession of another court, the former court may determine their rights as between one another, leaving the satisfaction of the judgment to the court which has possession of the property. The court distinguishes between the Adelbert College case and Byers v. McAuley on this point (p. 359). To the same effect see *Waterman v. Canal-Louisiana Bank and Trust Company*, 215 U. S. 33. See also *Riehl, Receiver, v. Margolies*, 279 U. S. 218.

In *Hebert v. Crawford*, 228 U. S. 204, was involved a conflict of jurisdiction between the State and Bankruptcy court as to who was in possession of certain property belonging to the bankrupt at the time of the filing of the petition. It was held that if the property was in possession of the bankrupt at the time of filing the petition, the Bankruptcy Court had juris-

diction to administer it and to determine all claims to the property. It also held inferentially that orders of the Bankruptcy Court were not subject to review by any other State or Federal Court of concurrent jurisdiction.

In *Murphy v. Hofman*, 211 U. S. 562, a Receiver in Bankruptcy had been appointed, and had taken possession of certain personal property of the bankrupt. A creditor, claiming title to a part of the property thereafter instituted action in the state court and undertook to replevy the property. The Bankruptcy Court enjoined the state court proceeding, and thereafter vacated the injunction. In the meantime, the property was sold by the Trustee. The Receiver appeared in the state court and answered that at the time its proceeding was instituted he was in possession of the property as Receiver of the bankrupt, and remained so until the adjudication, when he was appointed Trustee. The case turned on the right of the state court to proceed under the circumstances. The Supreme Court say:

> "The Bankruptcy Act of 1898, as originally enacted did not confer jurisdiction on the District Court of the United States over suits brought by trustees in bankruptcy to assert title to property as assets of the bankrupt or to set aside transfers made by the bankrupt in fraud of the creditors, or by way of preference, unless by consent of the defendant. * * * The act, however, preserves the jurisdiction, otherwise existing by statute, of the Courts of the United States, though it is limited to courts where the bankrupt himself could have

prosecuted the action. * * * But where the property in dispute is in the actual possessoin of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or State.

"Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property has an ancillary jurisdiction to hear and determine all matters respecting the title, possession or control of the property.

"In the Courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them.

"Wabash R. R. v. Adlbert College, 208 U. S. 38.

"Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a Receiver, it was held that the Bankruptcy Court had jurisdiction to determine the title to it as against an adverse claimant, and that the Receiver had no right to deliver it to him without the order of the court. * * *

"When the court of bankruptcy, through the acts of its officers, such as Referee, Receivers or Trustees, has taken possession of a res, as the property of the bankrupt, it has summary jurisdiction to hear and determine the adverse claims

> of strangers to it, and * * * its possession cannot be disturbed by the process of another court. * * *
>
> "On the whole case, we are of the opinion that the seizure of these goods on a writ of replevin from another court was an unlawful invasion of the possession of the court of bankruptcy, which cannot be disturbed. * * * "

The case of *Whiting v. Wenman*, 198 U. S. 539, involved the question of the right of a Trustee to maintain in the Federal Court an action to recover for goods that were constructively in the possession of the bankrupt,—the same having been placed with a warehouseman by the bankrupt. The court pointed out that *Bardes v. Bank*, 178 U. S. 524, did not determine the right of the Bankruptcy Court to entertain jurisdiction of a proceeding, having in view an adjudication of rights in or liens upon property which came into the possession of the Bankruptcy Court, as that of the bankrupt; the right to proceed concerning which would seem to be broadly conferred in the section of the Bankruptcy Act above quoted. (Section 2 (3) (7); and said of *White v. Schloerb*, 178 U. S. 542, that in that case, which was decided with the Bardes case, it was held that

> "After adjudication an action in replevin could not be brought in the State Court to recover property in the possession of and held by the bankrupt at the time of the adjudication, and in the hands of the Receiver in Bankruptcy when the action was begun, that the District Court of the United States sitting in Bankruptcy had power by summary process to compel the return of the property seized."

> property was voluntarily turned over by the Receiver, and thereby the jurisdiction of the District Court upon the ground herein stated, is defeated, as the property is no longer in the possession or subject to the control of the court, but the Receiver had no power or authority under the allegations of this bill to turn over the property * * * the court had possession of the property and jurisdiction to hear and determine the interest of those claiming a lien therein or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property by a Receiver and without authority of the court."

In *Wilson v. Seligman*, 178 U. S. 542, it was held that a replevin action in a state court could not be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of his adjudication, after the adjudication had been made, because the property in controversy was in custodia legis.

In *Chapman v. Hoover*, 114 U. S. 158, 172-3, the principle that property in the custody of a Trustee in Bankruptcy is in custodia legis, and that his possession cannot be interfered with by any other court is recognized.

In re *Tyler*, 149 U. S. 164, which was cited in support of the holding of the court in *Dayton v. Stanard*, 241 U. S. 588, property had been placed in the custody of a chancery receiver when tax executions were issued and levied upon the property. The Sheriff who made the levy was committed for contempt, and brought the instant action to secure his discharge on

habeas corpus from the commitment. In speaking of the effect of the appointment of a receiver the court say:

> "No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor * * *.
>
> "The general doctrine that property in the possession of a receiver appointed by a court is in custodia legis, and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and the wanton disregard of the orders of the court in respect to it.
>
> "The maintenance of the system of checks and balances charactristic of republican institutions requires the coordinate departments of government, whether Federal or State, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached

upon, save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary, fieri facias, sequestrates the property to answer the exigency of the right; but property in possession of the receiver is already in sequestration, already in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

Riehle, Receiver, v. Marjolies, 279 U. S. 218, (decided April 8, 1929) involved the right of a creditor to maintain an action against his debtor after a Receiver had been appointed. Judgment was rendered in the state court action, and it was contended that the judgment was void. The court held that the action in personam to establish the claim would be decided in the state court, but that no one can obtain any part of the assets or enforce a right to specific property in possession of a Receiver except upon application to the court which appointed him.

Harkin v. Brundage, 276 U. S. 36. This case involved the question of the right of a State or Federal Receiver, and the court said:

"As between two courts of concurrent and coordinate jurisdiction, the court which first obtained jurisdiction and constructive possession of

property by filing the bill is entitled to retain it without interference, and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its Receiver of the property in dispute."

In *Dayton v. Stanard*, 241 U. S. 588, the validity of certain tax sales made after the bankruptcy proceedings had intervened was involved. Solely on the ground that the property sought to be sold was in custodia legis, and was sold without leave of court, the sales were held to be invalid on authority of *Wiswall v. Sampson* (14 Howard), 55 U. S. 52; *Barton v. Barbour*, 104 U. S. 126; In re *Tyler*, 149 U. S. 164, and In re *Epstein*, 156 Fed. 42.

What was said by this Court in Wiswall v. Sampson, supra, pp. 32-33, of a sale where the title to the property was in an embarrassed condition, is applicable here. The trustee on the one hand is claiming the right to administer the property of the bankrupt, under orders of the Bankruptcy Court; he is, regardless of the sale by the District Court, in possession. On the other hand, the Appellee was claiming the right to have the property sold by the District Court, and the District Court granted such relief. An appeal was promptly allowed from the decree of the District Court, and the jurisdiction of the District Court to enter the decree was challenged. These are matters of which an intending purchaser at a foreclosure sale would naturally take notice. In such a situation, it is obvious that the Appellee would be the only purchaser at the sale, and that the property would go at a sacri-

fice. The Trustee was not in the same position as an ordinary individual.

It is admitted that at the time of sale, he had not been able to sufficiently inform himself concerning the property to offer it for sale. He could not, under these conditions, know whether it would be safe to invest funds of the estate in the property, even though he had sufficient money on hand to pay off the mortgage. Under the admitted facts, it will not do to say that the Trustee should have paid off the mortgage. If he did not have the money to pay it off, the general creditors should not be prejudiced by losing the value of the equity, simply because of a desire on the part of the holder of the debt to proceed to foreclose his lien. On the other hand, if he did have the money, and had no sufficient information regarding the matter, he should not be embarrassed by a forced sale without the consent of the Bankruptcy Court, which alone could determine whether or not it was advisable and to the best interest of the estate that the debt be paid off. The principle of this case is applicable alike to cases that arise in the state and federal courts, and it will create a serious impediment to the proper administration of the bankruptcy law if any other court than the Bankruptcy Court may force speedy action upon the part of the Trustee, without the consent of the Bankruptcy Court in matters of this kind. In fact, it is inconceivable that any court can, by threatening seizure and sale of the assets of the bankrupt in the custody of the Bankruptcy Court, compel it to act.

On the Other Hand If a State Court First Has Jurisdiction Which Is Not Avoided By the Bankruptcy Proceeding, It Retains It

The case of *Lion Bonding Company v. Karatz*, 262 U. S. 77, involved a conflict of jurisdiction between Receivers appointed by different courts in ordinary chancery suits. The Supreme Court, citing bankruptcy and chancery cases in which the principle had previously been announced, held that the state court having first acquired jurisdiction of the subject matter of the suit had power to hear and determine all controversies relating thereto, and while continuing to exercise such prior jurisdiction had the authority to determine for itself how far it would permit any other court to interfere with such possession and jurisdiction. Citing on the latter point *Palmer v. Texas*, 212 U. S. 118, in which it was also held that where a state court had acquired jurisdiction over property before application made to a Federal Court the court of the state had the right to determine for itself, while continuing to lawfully exercise its prior jurisdiction, how far it would permit any other court to interfere with such possession and jurisdiction.

In *Taubel, etc., Company v. Fox*, 264 U. S. 427, prior to bankruptcy a creditor of the bankrupt had secured a judgment and levied an execution upon property of the bankrupt. The trustee by summary process attempted to have the execution declared void,

and to obtain possession of the property. Jurisdiction of the court was attacked, and in passing on the question the court held that under the bankruptcy act the court had summary jurisdiction to adjudicate, without consent, controversies relating to the title of property which had come into its possession; that constructive possession was sufficient, and that such possession existed where property was in the physical possession of the debtor at the time the petition was filed, but was not delivered to the Trustee; where it was delivered to the Trustee, and was thereafter wrongfully withdrawn from his custody; where it was in the hands of the bankrupt's agent or bailee; where it was held by some other person, who makes no claim to it; and where the property was held by one who makes the claim, but the claim was colorable only; and finally on the question arising in the case that because the Sheriff, acting under orders of the State Court, had possession prior to the bankruptcy, the Bankruptcy Court did not have possession, either actual or constructive, and, therefore, that even though the lien of the execution might be declared invalid in a plenary action, it might not be so declared in a summary proceeding.

In *Hobbs v. Head, etc. Company*, 231 U. S. 692, the Trustee undertook to prevent the enforcement of a labor lien in a state court. The state court proceedings had passed to judgment before the adjudication of bankruptcy. It was held that the Bankruptcy Court properly denied the Trustee's petition to stay the state court proceedings.

In *York Mfg. Co. v. Cassell*, 201 U. S. 344, was involved the question of the right of the seller under a conditional sale contract to retake the property sold after the bankruptcy proceedings. The court held that the Trustee stood in the shoes of the bankrupt, and had no greater right than the bankrupt himself to the property, and that the seller had the right to the property. The proceeding, however, was in the Bankruptcy Court on the application of the creditor for the return of the property, and the case did not involve a conflict of jurisdiction.

In *Metcalf v. Barker*, 187 U. S. 165, it appeared that the bankrupts had transferred all their property to certain favored creditors and confessed various judgments in the state courts in favor of others, upon which executions were issued and levied upon personal property. A Receiver was appointed collusively, and other creditors instituted replevin actions. A judgment creditors action was also instituted, as a result of which the transfers were adjudged fraudulent. After these proceedings had terminated, and while the Receivers were in possession of the property under their appointment, a bankruptcy proceeding was instituted, and when a Trustee was appointed an application was made to the Federal Court in which the bankruptcy proceeding was pending for an injunction against further proceedings under the creditors action. The defendants in the creditors action objected to the jurisdiction of the bankruptcy court on the ground that they were not parties and had not been made parties to the proceeding. The in-

junction was granted. The filing of the judgment creditors bill and service of process was held to constitute an equitable lien on the assets, and as the lien was created more than four months prior to the bankruptcy proceeding, that the bankruptcy did not avoid it, but that the Trustee took his title as it was when the bankruptcy proceeding was instituted. It was held that as the state court had jurisdiction over the parties and subject matter and possession of the property, that court had exclusive jurisdiction to decide upon conflicting claims to its ultimate possession and control.

In *Jerome v. McCarter*, 94 U. S. 734, prior to the bankruptcy proceeding an action had been commenced in the state court to foreclose a prior valid mortgage. After the bankruptcy, the trustees were made parties defendant, and contended that as the bankruptcy proceeding had been instituted before the foreclosure decree was entered, the bankruptcy court had exclusive jurisdiction, and was entitled to the entire administration of the bankrupt's property. It was held that the objection was without merit. On authority of *Eyster v. Gaff*, 91 U. S. 521, in which a foreclosure proceeding was instituted prior to the bankruptcy proceeding, and the decree entered thereafter, the court saying, in answer to the contention of the assignee in bankruptcy that the court was without jurisdiction to render the decree, that as no sale or conveyance by the mortgagor pending the foreclosure proceedings could defeat the decree, and as the operation of the bankruptcy proceedings was similar to that

of a conveyance pendente lite, the Bankruptcy Act did not operate to affect the pending foreclosure suit. And,

"The court in the case before us had acquired jurisdiction of the parties, and of the subject matter of the suit. It was competent to administer full justice and was proceeding according to the law which governed such a suit to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously might have been affected the rights of parties to the suit already pending," and that the trustee could, if he desired, defend the pending case."

If a State Court Has Jurisdiction or Custody By Process Which Is Avoided By Bankruptcy, the Latter Court Is Entitled to Possession

In *Davis v. Friedlander*, 104 U. S. 570, an attachment had been levied upon property of the bankrupt more than four months prior to the filing of the petition for adjudication. The lien of the attachment was, therefore, good, and it was recognized that the State Court's jurisdiction was paramount; also that the Trustees in Bankruptcy, where a prior action was pending, had the right to appear in the State Court, and there make any defense they desired, and failing to do so they were bound by the decree there entered.

In *Lehman v. Gumble*, 236 U. S. 448, because a lien created by the levy of an attachment within four months of the filing of the petition in bankruptcy was voided by the provisions of Section 67-F of the Bank-

ruptcy Act, it was held that the prior possession of the State Court was no obstacle to the exercise by the Bankruptcy Court of jurisdiction over the property, and that it was properly seized by the Receiver of the Bankruptcy Court.

In *Watts v. Sachs*, 190 U. S. 1, 27, a receivership to wind up a corporation had been instituted in the state court when the bankruptcy proceeding intervened. The court held that the operation of the bankruptcy laws cannot be defeated by insolvent corporations applying to be wound up under state suits. "The bankruptcy law is paramount and the jurisdiction of the Federal Courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations is essentially exclusive. Necessarily, when proceedings in a state court are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possesison or of possession in enforcement of pre-existing liens or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the Receiver of one court cannot rightfully be taken from him without the court's consent by the Receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent."

In an appendix hereto is a digest of all of the cases

in the district courts and circuit courts of appeal, involving in any way this point decided since 1910.

On the Second Point

On this point the only question is:

Can a Trustee in Bankruptcy appeal and have a stay of the judgment or decree against him without giving a supersedeas bond?

The facts upon which this point is predicated are set forth on page 7 hereof.

The Bankruptcy Act (11 U. S. C. A., Sec. 48b) provides:

> "Trustees shall not be required to give bonds when they take appeals or sue out writs of error."

If this section means what it says, and what we believe it means, it is possible that a formal order staying proceedings would not be necessary as the allowance of an appeal would operate ipso facto to suspend the enforcement of the decree, so that any process issued thereon, pending an appeal, would be void, even though the court had jurisdiction of the property.

The general provisions relating to appeals are as follows:

28 U. S. C. A., Section 870:

> "Whenever a writ of error, appeal, or other process in law, admirality, or equity, issues from or is brought up to the Supreme Court, or a circuit court of appeals, either by the United States

or by *direction of any department* of the Government, no bond, obligation, or security shall be required from the United States, or from any *party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs*. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted." (R. S., Section 1001; March 3, 1911, c. 231, Sections 118, 289, 26 Stat. 1131, 1167.)

28 U. S. C. A., Section 869:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." (R. S., Section 1000.)

28 U. S. C. A., Section 874:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the

> citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days." (R. S., Section 1007; February 18, 1875, c. 80, Section 1, 18 Stat. 318.)

So far as we have been able to find, the question has never been directly presented to any court. It was indirectly presented in the Ninth Circuit in *Pacific Coast Casualty Company v. Harvey*, 250 Fed. 952, and without analysis or discussion, Section 48b of the Bankruptcy Act was construed adversely to our contention. In that case the court say:

> "It is true that under Section 25c of the Bankruptcy Act (now 11, U. S. C. A. 48b), the trustee was not required to give bond when he took the appeal or sued out a writ of error; but a supersedeas pending the appeal, though an auxiliary, was a separate matter. The appellate court could undoubtedly have reviewed the proceedings, even though appellant had failed to give any bond to supersede the proceedings on a judgment or decree entered against him. Logan v. Goodwin, 104 Fed. 494. Revised Statutes, Section 1000 (28 U. S. C. A., 869), is the general provision on appeal, for costs and damages or for costs only, according to whether or not supersedeas is obtained; but we do not think that Section 25c (11 U. S. C. A., 48b) relieving a trustee in bankruptcy from giving bond on appeal

> or writ of error, relieves him from the obligation to give such a bond as is required of any litigant where supersedeas is desired. In Re Barrett, 132 Fed. 362."

In that case the issue was as to whether a surety on a bond given in the form of supersedeas bond was liable for *costs* adjudged against a trustee in bankruptcy, so that what was said with reference to supersedeas is really no more than dicta. The case of Barrett, 132 Fed. 362, cited in the opinion, did not involve the question at all. There a receiver in bankruptcy had instituted a suit in equity for injunction and other relief, and a motion was filed to require him to give a cost and injunction bond as in other cases. It was held by the District Court he should not be required to do so. The point in the Pacific case for which it is cited as authority was not decided or discussed. So far as we have found the case has never been cited by any other court on the point at issue.

When we look to the nature and purpose of Section 48-b, there can be little doubt of the intention of Congress. Trustees in bankruptcy are officers of the court appointing them. *In Re Cadenas & Coe*, 178 Fed. 158; *In Re Howard*, 130 Fed. 1004, 135 Fed. 721. Their office is created by Congress (11 U. S. C. A., 61: "The offices of referee and trustee are created"). They have powers defined by the Act (11 U. S. C. A., 75) and a title conferred by it upon them (11 U. S. C. A., 110). Property thus acquired is held by them by virtue of their office, in custodia legis, *U. S. F. & G. Company v. Bray*, 225 U. S. 205; *Robertson*

v. Howard, 229 U. S. 254; *In Re Sheinman*, 14 Fed. (2) 323; *In Re Eppstein*, 156 Fed. 42. Clearly their rights, powers and relation to the property is of a higher order than possessed by any other custodian or receiver that could be appointed by the judicial branch of the government.

From the standpoint of creditors and those with whom the trustee may litigate, their rights and the trustee's are fixed as of the adjudication. The former are entitled to a distribution of the estate under principles fixed by the act, the latter is entitled to enforce this distribution and to protect and recover the estate. No provision of the act or any other act, contemplates that a creditor can by virtue of any action on his part secure a greater benefit from the estate than is contemplated under it. For instance, the trustee may contest a claim and on losing appeal, but a supersedeas against the collection of it, as a supersedeas is ordinarily given, would not, the trustee being defeated on the appeal, render the estate liable for the entire claim. A more apt illustration is afforded by the facts of this case. Here the trustee is seeking to deprive the appellee of the remedy of foreclosure without the consent of the bankruptcy court, on property in its custody. This right has been denied him and he appeals. It is said he has no right to stay the sale without a supersedeas bond. Now, what damages could be here allowed the appellee, a creditor, whose rights are fixed by the act, without running afoul the act itself. The estate is not liable for a deficiency under the mortgage should there be one, but a supersedeas bond could

possibly make it so, notwithstanding the trustee obviously has no power or authority to assume an indebtedness on behalf of the estate which it would not otherwise owe. A supersedeas bond in a mortgage foreclosure is fixed at an amount sufficient to cover costs of the appeal and for delay if the appeal is without justification. *Omaha Hotel Company v. Kountze,* 107 U. S. 378. The theory being, as the court in that case, after an extended review of the authorities, said:

> "In view of the authorities, therefore, as far as they go, if the bond in the present case is to be regarded as important nothing more than the bond prescribed by the statute, it is clear that it did not operate as security for the original decree, nor for the interest which accrued pending the appeal, nor, by consequence, for the balance of these amounts, or either of them, after applying the proceeds of the mortgaged property. The item of $530 costs unpaid by the defendants in the original foreclosure suit, came under the same head, being part of the original decree, to pay which the lands were ordered to be sold. The only ground of recovery upon the bond could be: 1, the depreciation of the property in market value pending the appeal; or 2, its deterioration by waste, or want of repair, or the accumulation of taxes or other burdens; or 3, the use and detention of the property pending the appeal, that is, the rents and profits; or 4, the non-payment of the costs of the appeal, which accrued in this court; but the special verdict does not find that these costs were unpaid.
>
> "If depreciation in market value can ever be laid as cause of legal damages on a bond in error, which we greatly doubt, it cannot be done in this

case, because it is found by the special verdict that the property considerably increased in value pending the appeal. Deterioration by waste, etc., is a very different matter; but that is equally out of the question in this case, as no deterioration is shown. The defendants paid the taxes and insurance, and kept the property in repair. The principal question for consideration, therefore, is, whether the plaintiffs were entitled to recover the rents and profits, or damages for the use and detention, as it is otherwise called.

"We have seen that even in ejectment, it has at least been questioned by this court whether the bond in error covers rents and profits accruing pending the writ. And yet there is a material difference between the case of ejectment and a suit for the foreclosure of a mortgage.

"The difference is this: in ejectment, the property of the land is in question, and if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar, or dollar's worth, is so much of the plaintiff's property of which he is deprived. And the same is true in dower. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged: they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. This is not only the common law, but it is the express statute law of Nebraska, which declares that 'In the absence of stipulations to the contrary, the mortgagor retains the legal title and right of possession.' The plaintiff, in this case,

was not entitled to possession, nor, to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing, the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him, as of right. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him. Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not covered by reasonable insurance, and the like, probably might also be fairly covered by the bond. But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly.

"The mere delay of the sale for the purposes of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt; he has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged, in order that the proceeds may be applied to the debt. The amount due is ascertained by the decree, it is true, but only for the purpose of determining the amount of charge on the land. The debt may be prosecuted by a per-

sonal action against the debtor, and this may be the defendants in the suit or some other person. The rule of court by which a personal decree may, in some cases, be entered up against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied, is a recent rule intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree for foreclosure and sale.

"It often happens that the debt is not fully ascertained when a decree for sale and foreclosure is made; as where there are many outstanding bonds which have to be called in and verified. The sale, in such cases, is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all which shows that a decree of foreclosure is a very different thing from a personal decree or judgment for the debt.

"As it is a specific thing, the land itself, and not the rents and profits, that constitutes the pledge, the delay of sale caused by the appeal, as before said, deprives the mortgagee of no legal right. It may be an incident of disadvantage or inconvenience, but in our judgment it is not a legal damage contemplated by the appeal bond. We are aware that a contrary view has sometimes been taken at the circuit; but upon a full consideration of the subject, we have come to the conclusion now expressed. The chances of actual deterioration and waste in certain classes of property are so great, that a bond in a considerable amount may well be required; and if actual deterioration and waste supervenes, the amount may properly be recovered.

"In addition to these general considerations, a careful examination of the 29th rule will show that in cases like the present, it does not, in terms at least, contemplate security for the use and detention of the property pending the appeal. The words are 'indemnity in all such cases (where the property in controversy necessarily follows the event of the suit) is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, etc.' 'The sum recovered for use and detention,' here referred to, means the sum recovered in the original judgment or decree, such as damages and mesne profits in ejectment, damages in dower, and replevin, etc., and the phrase 'just damages for delay' refers to those damages arising from the delay occasioned by the proceedings in error or appeal which are properly a legal damage to the party delayed. We are thrown back, therefore, to a consideration of the nature of the particular case, to ascertain what those legal damages properly are. The words 'use and detention' do not assist us, as they relate to a cause of recovery in the original judgment.

"There is another consideration which relieves the conclusion which we have reached from any supposed hardship or injustice to mortgagees. Courts of equity always have the power where the debtor is insolvent, and the mortgage property is an insufficient security for the debt, and there is a good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver, and preserve not only the corpus, but the rents and profits for the satisfaction of

> the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection. There is no necessity, therefore, in order to protect him from injury, that a party in order to have the benefit of an apepal, should be obliged to give security to account for the intermediate rents and profits of his own property." (Rule 29 is now Rule 33.)

Is it possible that a bankrupt estate not otherwise liable for debt, or interest, or a penalty or waste, or delay, or the ordinary results of losing an appeal, could be held therefore on an ordinary assumption of it? When we consider the law itself there is no ground for such a view. The delay thus caused by the trustee, is a delay of the law itself, for which no one interested should suffer or gain. The estate should not be penalized for the act of the trustee in the performance of his duty and his opponent should not gain by it an advantage the act does not in spirit or tenor afford. We know of no principle of bankruptcy law under which when an estate is being administered for the benefit of creditors, whereby the creditors can get damage for waste or the like, for delay, or anything else, from the bankruptcy court itself.

We suggest that as in the ordinary case of receivership, judgments against a trustee should not be executed upon property of the trustee, but certified to the court having custody of the property for observance. This done, no supersedeas would be necessary, for it must be assumed the court having such custody will do its duty. The creditor is certainly not entitled

to additional security for his claim simply because of the appeal.

The foregoing general observations as to the nature and character of a supersedeas, and as to the trustee's position make it clear that even without the significant mandate of Section 48b it is doubtful if a bond to stay a decree appealed from by a trustee should or could be required. Congress evidently intended to relieve the trustee of the duty of making bond for these reasons. When it is said the trustee shall not be required to give bond when he appeals it is foolish to say he must give bond.

When we consider that section in conjunction with the other sections quoted above, relative to bonds on appeal, it is perfectly clear that the trustee should be treated as being within the excepted classes named. He appeals, not so much in his own right, as to vindicate and secure an enforcement of the mandates of the bankruptcy act under administration by the judicial department of the Government. His office requires it, as much so as though he were the Comptroller of Currency, Secretary of the Treasury, of State, the Attorney General, or any other Governmental Department head. His office places him in the position of an agent of the Government for the enforcement of the Bankruptcy Act. And the enforcement of that law is as much a part of the plenary power and duty of the government as any other. The trustee's office is created for that purpose, with as much dignity attaching to it as to any other office of the government. Section 870 of Title 28 exempts gov-

ernmental agencies from the operation of Section 869 and 874. Receivers of Federal courts are exempt under its provisions. *Central Trust Co. v. St. L., etc., R. Co.*, 41 Fed. 551; *Pepper v. Bank*, 125 Fed. 822; *Bank v. Mixter*, 114 Fed. 463, although the contrary has been held by a New York circuit court. *Peatt v. Advance*, 90 Fed. 772. The trustee is under the same head. And, when we consider Title 11, Section 48b, which clearly exempts him from giving "bond" on appeals or writs of error, in the light of the purposes of the act as a whole, and in connection with Title 28, Sections 869, 870 and 874, there is no escape from the conclusion that the trustee is exempted from giving any sort of bond whatsoever. To say he need not give a bond for costs, but must give a supersedeas bond under this section is a contradiction of the Statute. There are only two classes of bonds on appeal. Neither is jurisdictional, as held in *Rederiaktiebolazet Amie v. Transp. Company*, 245 Fed. 282, and *Omaha Hotel Company v. Rountze*, supra. Both classes of bonds are the subject of all three of the Sections of the Judiciary Article (869, 870, 874). To require one and not the other, therefore, creates an irreconcilable conflict with 11 U. S. C. A. 48b.

CONCLUSION

For the reasons stated we respectfully submit the decree appealed from should be reversed and the cause ordered dismissed for want of jurisdiction.

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APPENDIX

DIGEST OF DISTRICT AND C. C. A. CASES HOLDING:

That the Bankruptcy Court Having First Acquired Jurisdiction of Property Retains It Against All Others

In *First Trust Company v. Baylor* (C. C. A. 8), 1 Fed. (2d) 24, a foreclosure proceeding was instituted in a State Court to foreclose a valid mortgage prior to bankruptcy. A Receiver was appointed in the foreclosure suit, which was reversed, and subsequent to the bankruptcy another foreclosure suit was filed in the State Court. The Trustee sought an injunction in the bankruptcy proceeding to restrain the foreclosure suit, on the ground that the property was in custodia legis at the time the foreclosure was instituted. The injunction was granted and the mortgagee appealed .

The Court held that the State Court had no jurisdiction at any time over the subject matter, because the first sale was void, and the purchaser held the property for the bankrupt, so that the property was in the custody and under the jurisdiction of the Bankruptcy Court. The Court say:

> "The foreclosure suit was filed after the petition in bankruptcy. Therefore the property against which the petitioner here sought to foreclose its mortgage, at the time of the commencement of the foreclosure suit, was in the custody

and under the jurisdiction of the bankruptcy court. In re Hoey, et al. (C. C. A. 2), 290 F. 116, 118; In re Schermerhorn (C. C. A. 8), 145 F. 341, 342; Johnston v. Spencer (C. C. A. 8), 195 F. 215, 218; In re Jarnol, Petition of Fisher (D. C.), 283 F. 547.

"In Re Hoey, supra, the Court said:

" 'It is well established that the federal court of bankruptcy has exclusive jurisdiction over all the property held by or for the bankrupt and not in possession of any adverse claimant. Lazarus v. Prentice, 243 U. S. 263; Acme Co. v. Beekman Co., 222 U. S. 300. When that court once has jurisdiction over a res, no subsequent action of another court can divest it thereof. The filing of a petition in bankruptcy fixed the date from which the jurisdiction attached. Mueller v. Nugent, 184 U. S. 1. What then passed to its jurisdiction is property actually or constructively in the possession of the bankrupt, if the legal title thereto is not in a third party. It would also obtain jurisdiction over property in adverse possession of a third party, if the true legal status were that title was in the bankrupt. Thomas v. Woods, 173 F. 585; 19 Ann. Cs. 1080; Clay v. Waters, 178 F. 385, 21 Ann. Cs. 897; Orinoco Iron Co. v. Metzel, 230 F. 40.'

"This jurisdiction extends to property upon which there are valid liens.

"In the case of Pugh v. Loisel, re Joseph Webre Co. (C. C. A. 5), 219 F. 417, the court said:

" 'We think it is apparent that the Bankruptcy Act, as a whole, contemplates the taking possession and control of the bankrupt's estate by the Court of Bankruptcy acting through its

trustee. The property is taken into custody in the condition in which it is found at the time of the filing of the petition, subject to all existing valid liens upon it. The filing of the petition, of course, does not disturb such liens; but neither the existence of such liens nor attempts of the lienors to enforce them without resorting to the court of bankruptcy for that purpose constitute obstacles to the exercise by that court of the right to take into custody the bankrupts' estate and to control the administration of it. The court is vested with ample power to protect the rights of the lienholders otherwise than by permitting them to be enforced in some other court or courts. Whitney v. Wenman, 198 U. S. 539, Bankruptcy Act, Sects. 2, 57, 67, 69a, 70.'

"In the case of Whitney v. Wenman, 198 U. S. 539, the court said:

" 'We think the result of these cases is, in view of the broad powers conferred in section 2 of the Bankruptcy Act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein.'

"The status of property upon which there are valid liens is discussed in an opinion by Mr. Justice Sanford, while District Judge of the

Eastern District of Tennessee, in the case of In Re Star Ice & Coal Co., Petition of Griffin Ice & Coal Co., 252 F. 301, at page 303, as follows:

" 'Under section 70 of the Bankruptcy Act, the trustee is vested only with the bankrupt's title to property. Hence where the bankrupt's property is subject to a mortgage or other incumbrances, the trustee takes only the bankrupt's equity therein, subject to such incumbrances; and, since under section 67 of the act, the validity of the pre-existing liens is not affected, the lienholder, unless restrained by the order of the bankruptcy court, may enforce the same dehors the court. Ward v. Bank of Ironton (6th Cir.), 202 F. 609; In re Goldsmith (D. C.), 118 F. 763; Coll Bankruptcy (11th Ed.), 1050, 1051. Nevertheless the bankruptcy court may in the interest of general creditors regulate the method of enforcing such lien in order to realize as much as possible from the bankrupt's equity. In re Jersey Island Packing Co. (9th Cir.), 138 Fed. 625; Choen v. Nixon (D. C.), 236 F. 407, 411. If the property comes into the possession of the bankruptcy court, it may sell the property free from the lien and award the lienholder a preferential payment representing the proceeds of his lien. In re Ocenee Milling Co. (5th Cir.), 109 F. 866; In re Loveland (1st Cir.), 155 F. 838, 839; In re Keet (D. C.), 128 F. 651; In re Cutler (D. C.), 228 F. 771, 773. This practice is, however, of doubtful propriety where the right to a lien is disputed and its determine would involve a controversy productive of delay in the bankruptcy proceedings. In re Mulhauser (6th Cir.), 121 Fed. 669. Or the

bankruptcy court may, in its discretion, sell merely the bankrupt's equity in the property, that is, sell the property subject to the incumbrance and leave the lienor to enforce his lien upon the property by appropriate proceedings. In re Gerry (D. C.), 112 F. 958; In re Cutler 228 F. 773. Loveland Bankruptcy (2d Ed.), 1 93. In thus selling the property subject to lien, the trustee acts only in the interest of general creditors. 2 Lovel. Bankruptcy supra at page 1094.'

"See also In re Southern Pharmaceutical Co., Petition of Alexander et al. (D. C.), 286 F. 148, at page 151; In re Dayton Coal & Iron Co. Ltd. (D. C.), 291 Fed. 390; Ward v. First National Bank of Ironton, Ohio, 202 Fed. 609.

"The adjudication in bankruptcy does not divest the state court of jurisdiction to entertain a proceeding for the foreclosure of a valid lien against the property of the bankrupt. But where the bankruptcy court has acquired jurisdiction of the rest the jurisdiction in bankruptcy will not be disturbed without its consent while the bankruptcy proceedings are pending. The trustee may with the consent or under the direction of the bankruptcy court abandon the property covered by the lien, and the bankruptcy court may grant permission to the mortgage creditor to foreclosure in the state court. Re Zehner (D. C.), 193 F. 787; McHenry v. La Societe Francaise d'Epargees, 95 U. S. 58; In re Brinn (D. C.), 262 F. 527.

"But if the mortgage creditor without consent of the bankruptcy court commences a proceeding in the state court for the foreclosure of his lien, which will interefere with the orderly administration of the assets of the bandrupt-estate, it

may restrain such foreclosure proceeding under the broad provisions of section 2 of the Bankruptcy Act. In re Dana (C. C. A. 8), 167 F. 529; First Savings Bank & Trust Co. v. Butler (C. C. A.), 282 F. 866; Re Pittelkow (D. C.), 92 F. 901; In Re Russell (C. C. A. 2), 101 F. 248; In re Emslie et al. (C. C. A. 2), 102 F. 291; Morehouse v. Giant Powder Co. (C. C. A. 9), 206 F. 24; In re Hoey (C. C. A. 2), 290 F. 115, 292 F. 269. The Bankruptcy Court therefore had the power to restrain the prosecution of the foreclosure suit. The order entered, however, perpetually enjoined the prosecution of this suit. The lower court relief upon the case of First Savings Bank & Trust Co. of Albuquerque, N. M., v. Butler, supra, as authority for this order. An examination of the order in that case discloses that it contained the following provision: 'And it is further ordered that this decree and injunction be and remain in full force and effect until the further order of this court, not exceeding 12 months after the date of the adjudication in bankruptcy.'

"In summing up its conclusions in Re Pittelkow, supra, the court in part said:

"'(1) That jurisdiction exists to restrain mortgagees for a reasonable time, from commencing foreclosure proceedings, and to order sales free from incumbrances, in special instances, after due hearing, where the rights are clear.

"'(2) That sufficient facts appear to enjoin all the mortgagees or lien claimants who were duly cited herein from instituting foreclosure proceding until the further order of the court, but with leave to any mortgagee or lien claimant

to present his petition before the referee to be heard respecting any alleged necessity for immediate foreclosure or of unreasonable delay on the part of the trustee, for report to the court whether the petitioner or petitioners should be exempted from the order.' "

In *First, etc. Company v. Butler* (C. C. A. 8), 282 Fed. 866, was involved the question whether the Bankruptcy Court could restrain a mortgagee from foreclosing his mortgage after the property mortgaged had passed into possession of the Bankrupt Court. The Court say:

> "Under the constitution the jurisdiction of a Court of Bankruptcy in administering the estates of bankrupts under the provisions of the Bankruptcy Act is complete and exclusive, and it is not only the right but the duty of such courts to draw unto themselves all the property of the bankrupt estate, and the determination of all claims and demands existing against the same to the end that there may be an orderly and complete determination and settlement of the entire estate among creditors."

The application for the injunction in that case was made in the Bankruptcy Court ancillary to the main cause.

In *Nisbit v. Federal Title & Trust Company* (C. C. A. 8), 229 Fed. 644, an attachment, which was avoided by the subsequent bankruptcy, had been levied, and the property came into possession of the Bankruptcy Court. Conflicting claims were asserted thereto. The court held that where the Bankruptcy

Court has acquired lawful custody of property to which conflicting liens attach, it has jurisdiction to determine priority of such liens though the trustee has no interest in the question.

> "That the administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by Congress, it becomes a branch of equity jurisprudence; property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners are, and to that end call before it all claimants by reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or custody in the property in its custody, or in its proceeds, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds. Upon that court (the court of bankruptcy), therefore, devolved not only the power but the duty to determine by appropriate proceedings, to whom this property or any part of it rightfully belonged and to make distribution and disposition accordingly." (Certiorari was denied, 241 U. S. 669.)

In *Galbraith v. Robson-Hilliard Co.* (C. C. A. 8), 216 Fed. 842, property had come into the possession of the Bankruptcy Court encumbered with a mortgage. It was held that the Bankruptcy Court had power and exclusive jurisdiction to determine the validity of the lien of the mortgage by virtue of its possession.

In re *Roger Brown & Co.* (C. C. A. 8), 196 Fed. 758, the Referee had ordered a sale of the bankrupt's property in its possession, free of certain mortgage liens. Before the sale a creditor instituted suit in the State Court against the mortgagee to establish an equitable lien on the same property. The court held the Bankruptcy Court was authorized to stay proceedings in the State Court.

In *Clay v. Waters* (C. C. A. 8), 178 Fed. 385, the Court say:

> "An adjudication in bankruptcy is a seizure by the court of bankruptcy, and a transfer to that court of all property in the possession of the bankrupt at the time of the adjudication in which he has any interest. Thenceforth, such property is a part of the trust estate in the legal custody of the court for the benefit of the creditors of the bankrupt and adverse claimants. * * *
>
> "The property here in controversy was in the possession of the bankrupt when the petition was filed and when the adjudication was made, and it then passed within the jurisdiction of the District Court below * * *
>
> "The District Court sitting in bankruptcy has jurisdiction to determine by summary proceedings, after reasonable notice to claimants, to present their claims to it, controversies between the trustee and adverse claimants over liens upon, and the title and possession of (1) property in the possession of the bankrupt when the petition is filed; (2) property held for third parties for him; (3) property wilfully seized by the Marshal as the bankrupt's, under clause 3 of Section 2, of the Bankruptcy law, and (4)

property claimed by the trustee which has been wilfully reduced to actual possession by officers of the court.

"Such controversies are controversies in proceedings in bankruptcy under Section 2, and they are not controversies at law or in equity as distinguished from proceedings in bankruptcy within the meaning of Section 23."

The decision in this case on the question decided was approved by the Supreme Court in *Board of Trade v. Johnson*, 264 U. S. 1.

In *Holstein Harvey* (D. C. Del.), 26 Fed. (2d) 798, a foreclosure proceeding instituted on the day the bankruptcy petition was filed was enjoined.

In re *Gillett* (D. C. Cal.), 18 Fed. (2d) 687, it was held that the Bankruptcy Court should restrain foreclosure proceedings on a mortgage against property of the bankrupt where it appears that there is an equity for the estate.

In re *South Florida, etc., Corporation* (D. C. Fla.) 16 Fed. (2d) 171, it was held that the Bankruptcy Court had authority to and would enjoin foreclosure proceedings after the bankruptcy by lienholders, where there was a substantial equity in the property.

In *Allebach v. Thomas* (C. C. A. 4), 15 Fed. (2d) 853 (Certiorari denied), it was held that whether foreclosure proceedings would be authorized after bankruptcy was a matter solely within the discretion of the bankruptcy court, and that it may adopt any one of the several courses authorized for disposing of the same. In re *Jersey Island Packing Company* (C.

C. A.), 138 Fed. 625, is quoted with approval as follows:

> "The Trustee in Bankruptcy has the election to refuse to take possession of mortgaged property if its value over and above the encumbrance is not sufficient to justify an attempt to administer it. It is true that the bankruptcy act provides that liens such as the lienholders had under the trust deeds in this case shall not be affected by bankruptcy, but that is far from saying that such lienholders may, after the commencement of proceedings of bankruptcy against the debtor, proceed to enforce their liens or contracts in the manner prescribed in the instrument which created them; and this is true whether such lien is an ordinary mortgage or a deed of trust, with provision for a strict foreclosure by notice and sale. The provision of the bankruptcy act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholders contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract so long as an equally efficient and adequate remedy is substituted. Every one who takes a mortgage or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract."

The court also approved In re *Hasie*, 206 Fed. 789; In re *North Star, etc., Company*, 252 Fed. 301, by Mr. Justice Sanford, and its own decision in *Sturgiss v. Corbin*, 141 Fed. 1.

In re *Ginesti* (C. C. A. 1), 15 Fed. (2d), 764, it was held that "entry to foreclose" was not a foreclosure and was permissible, although this decision apparently is in conflict with the rule which is laid down so often in the Supreme Court decision that after the filing of the petition the property is in custodia legis. Here it was apparently, by consent of the court, surrendered to the mortgagee who received the rents.

In re *Dyer* (D. C., N. J.), 8 Fed. (2d) 376, it was held that parties desiring to make a Trustee in Bankruptcy a party to foreclosure proceedings, must first obtain permission from the Court or Referee. The decision was reversed on other grounds in 28 Fed. (2d) 740.

In re *Stamps* (D. C., Ga.), 300 Fed. 162, the bankruptcy proceeding took place before the institution of the foreclosure suit, and speaking of the effect of this, the court held that the actual possession by the Bankruptcy Court of the property involved effectually displaces the power of all other courts to deal with it, but that the Bankruptcy Court could relinquish control or expressly consent to another court's proceeding.

In re Hoey (C. C. A. 2), 290 Fed. 116, which was expressly approved by the Supreme Court in *Board of Trade v. Johnson*, 264 U. S. 1, 13-14, the ruling was that a membership in the New York Stock Exchange was held for the bankrupt so that upon his adjudication the property passed to the exclusive jurisdiction of the Bankruptcy Court, and no subsequent action of another court can divest it thereof, and that the Bankruptcy Court had jurisdiction to enjoin the

prosecution of actions tending to interfere with the administration of the bankrupt's property.

In re Jarnal (D. C., Mich.), 283 Fed. 547, a lien creditor sought to re-claim possession from the Bankruptcy Court of property that had passed to the Trustee. The court held that as the Bankruptcy Court had possession of the property it had jurisdiction and power to sell it, subject to or free and clear from liens as it deemed to be to the best interest of the creditors of the bankrupt, and the greatest advantage of the administration, and that so long as the court has possession no one is entitled to hold or control the property except by order of the court in whose custody the property remains.

Duncan v. Girard (C. C. A. 5), 276 Fed. 554, was an action to restrain the prosecution of a foreclosure suit. The property passed to the Trustee. It appeared, however, that the bankrupt had purchased the property subject to the mortgage. The court held that because no relief was sought against the bankrupt, and as the mortgage created a valid lien, enforcible in the State Court, and as the Trustee's title was subject to the lien of the mortgage, he was not obliged to take title if the lien was burdensome, but could only do so by discharging the lien of the mortgage, and, therefore, that an injunction was improper.

In re Locust Building Co. (D. C., N. Y.), 272 Fed. 988, the Trustee was in possession of the mortgaged property when foreclosure proceedings were brought. There was an equity for the estate. The court held that as the Bankruptcy Court had already ordered

the sale of the property the stay of the foreclosure suit should be continued, citing *Murphy v. Hofman*, 211 U. S. 562, and *Wabash R. R. v. Adelbert College*, 208 U. S. 38.

Re Charak v. Durphee (D. C., Mass.), 252 Fed. 885, it was held that the custody of property in possession of the bankrupt at the date of the filing of the involuntary petition against him rests with the Bankruptcy Court, and the Receiver is entitled to sell mortgaged property in the possession of the bankrupt at the time of the filing of the petition as against the mortgagee, who sought to take possession of same, for the purpose of foreclosure.

Karasik v. Trust Company (D. C., N. Y.), 241 Fed. 939, was an action by a Trustee to enjoin the foreclosure of mortgages made by a bankrupt. It was held that the bankruptcy court having possession of the property had jurisdiction to determine any controversy relating to the mortgages. In speaking of the Whitney case, 198 U. S. 539, the Court say:

> "That case is authority for the proposition that issues in bankruptcy with respect to property in its custody are within its exclusive jurisdiction unless it releases the same."

First Trust, etc. Bank v. Bitter Root Valley Irrigation Company (D. C., Mont.), 237 Fed. 733, which was affirmed in *Knudson v. Bank* (C. C. A. 9), 245 Fed. 81, in which was involved the question whether the primary court of bankruptcy sitting in equity, which had acquired jurisdiction by the filing of fore-

closure proceedings therein, would permit a foreclosure suit in the State Court. It was held in both opinions that the foreclosure suit could not be maintained. The Circuit Court of Appeals say:

> "The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and this to the exclusion of other courts of coordinate jurisdiction assuming to exercise like power."

And, quoting from *Farmers Loan, etc. Company v. Lake Street R. R. Co.*, 177 U. S. 51:

> "Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, liquidate insolvent estates, and in suits of similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

In *Roger v. Levert* (C. C. A. 5), 237 Fed. 737, foreclosure proceedings had been instituted and prosecuted to judgment in the State Court prior to the bankrupt proceedings, but by reason of the peculiar provisions of the Louisiana law the foreclosure suit is a purely personal action and does not partake of the nature of an action in rem until after the writ of fieri facias had been issued and a seizure made. At the time of the bankruptcy the bankrupt was in full

possession of the property, a receiver was appointed in bankruptcy, and the property passed into his possession. At this stage the plaintiff in the State Court asked leave of the Bankruptcy Court to proceed in the State Court. This was denied, the Court saying:

> "It is well settled that under the constitution and laws of the United States Bankruptcy Courts are vested with superior and exclusive jurisdiction in the administration of the estate of the bankrupt. * * *
>
> "Any property surrendered by the bankrupt which could or should be released by the court from such administration can only be property in which, by reason of conceded and absorbing superior liens and privileges, the Trustees in Bankruptcy have no equity."

The decision was cited with approval in the opinion of the same court in *Security Mortgage Company v. Powers*, 21 Fed. (2) 965, but the judgment in that case was reversed by the Supreme Court on other grounds in 278 U. S. 153, the point at issue herein being conceded, and properly so, as is shown by the opinion of this court in that case. (See pages ——— hereof.)

In *Orinoco Iron Co. v. Metzel* (C. C. A. 6), 230 Federal 40, which is expressly approved by the Supreme Court in *Board of Trade v. Johnson*, 264 U. S. 1, 13-14, an injunction was sought by the Trustee to restrain the prosecution of a suit in the Supreme Court of the District of Columbia, which was instituted to enforce defendants' rights in an indemnity fund in the Treasury of the United States. It was

held that as to property in the custody of the bankruptcy court its jurisdiction is exclusive, especially is it exclusive over the general administration of the estate, and it also has exclusive authority to determine the claims of creditors, adverse claims, whether by way of ownership or paramount liens. The fund in controversy was held to be in custody of the United States for the benefit of the bankrupt, and, therefore, that it passed to the Trustee, and that the controversy between the claimant and the trustee was cognizable *exclusively* in the bankruptcy court, and also that the Supreme Court of the District of Columbia had no jurisdiction over the suit "whose prosecution has been enjoined by the Bankruptcy Court, not only because the jurisdiction of the latter court had already attached, but because that jurisdiction, in the circumstances presented, is exclusive.

Pugh v. Loisel (C. C. A. 5), 219 Fed. 417 (Certiorari denied 238 U. S. 631), involved the question of the right of a mortgagee to proceed with a foreclosure proceeding instituted in the State Court after the petition for adjudication was filed, but before the adjudication. An injunction was entered, and the mortgagee appealed.

After a full discussion of the *Hiscock* (206 U. S. 28), *Jones* (226 U. S. 148), *Mueller* (184 U. S. 1), *Acme Harvester Company* (223 U. S. 300), and *Whitney* (198 U. S. 539) cases, the court concluded that the property having passed into the custody of the Bankruptcy Court by the filing of the petition after adjudication deprived the State Court thereafter

of entertaining a suit to foreclose a lien thereon. The Trustee was held not to have submitted to the State Court jurisdiction by merely appearing therein and questioning its right to proceed. This is a leading case.

In *McLoughlin v. Knop* (D. C. La.), 214 Fed. 260, it was held that a State Court has no jurisdiction to foreclose a mortgage after bankruptcy has intervened, without leave of the Bankruptcy Court, and making the Trustee a party.

In re Hasie (D. C. Texas), 206 Fed. 789, it was held that a sale by a Trustee under a deed of trust containing a power of sale, while the property was in possession of the Trustee in Bankruptcy, without the consent of the Bankruptcy Court, is void, and does not divest the title of the Trustee in Bankruptcy.

In re Monroe (D. C. N. Y.), 195 Fed. 818, it was held that title to property that had been taken from the bankrupt prior to the filing of this petition by state process could be tried in the State Court, but if the property had come into possession of the Trustee the title must be determined in the Bankruptcy Court.

In re Zeibner (D. C. La.), 193 Fed. 787, it was held that when the Federal Court had acquired possession of property its jurisdiction was exclusive, and could not be interfered with by subsequent State Court proceedings. The conditions under which the Bankruptcy Court can or should relinquish jurisdiction are stated.

The Ancillary Jurisdiction and Its Subordination to the Primary Court Which Has Custody and Exclusive Authority to Administer the Bankrupt Estate

In *Britton v. Western Iowa Co.* (C. C. A. 8), 9 Fed. (2d) 488, 490, it was held that where the Trustee is in possession of the bankrupt's property or where the lienholder voluntarily submits his right to the court of bankruptcy, that tribunal has jurisdiction to determine the validity and extent of the lien, dispose of the property, satisfy the lien, and apply the balance to the payment of general creditors, and under this rule the Trustee having been in possession and the lienholder having voluntarily submitted to the jurisdiction, it was held that the Bankruptcy Court alone had jurisdiction to determine the validity of the lien, and if valid to satisfy it.

In *Civic Center Realty Company* (D. C. Md.), 26 Fed. (2d) 825, it was held that the Bankruptcy Court must itself determine whether a mortgagee could proceed in the state court or not.

In *U. S. v. Wood* (C. C. A. 2), 290 Fed. 109, it was held that all "proceedings in bankruptcy" were within the exclusive jurisdiction of the Federal Courts of Bankruptcy.

In re U. S. Chrysotile Co. (D. C. N. Y.), 253 Fed. 294 (by Augustus N. Hand, now Circuit Judge), it was recognized that a Court of Bankruptcy in one state could sell property in the possession of its Trustee in another, and that in an ordinary case the pri-

mary court permits the mortgagee to proceed to foreclosure and establishment of its lien.

This case is cited with approval in a note by Mr. Justice Brandies in *Robertson v. Labor Board*, 268 U. S. 619, 624, in which it is said "even the jurisdiction of the Bankruptcy Court is subject to the territorial limitation." Although the adjudication in one district brings the property of the bankrupt wherever situated into custodia legis, that court cannot issue an order upon a person in another district, not a party to the proceeding, to deliver it up. Ancillary proceedings are brought in the other district.

In re Patterson Lumber Co. (D. C. Tenn.), 247 Fed. 578, bankruptcy proceedings had been filed in New York against the bankrupt, and receivers appointed for its property. Ancillary receivers were appointed in Tennessee in the bankruptcy proceedings and thereafter the holder of a mortgage in Tennessee undertook to foreclose. The Trustee in Bankruptcy applied to the Federal District Court in Pennsylvania (228 Fed. 916), where it was held the mortgagee should have obtained leave from the court having jurisdiction of the mortgaged premises to foreclose. The primary court authorized the trustee to sell free of liens, and enjoined lienholders pending the sale. The mortgagee filed the instant case in the Tennessee Court to restrain the foreclosure. The District Judge (Mr. Justice Sanford) held that the mortgaged property in possession of a bankrupt at the time the petition is filed is brought into custody of the primary court, and as against the contention that the ancillary

court had jurisdiction to determine the method of foreclosure, that the primary court alone had jurisdiction to determine whether the mortgage should be foreclosed in independent proceedings, or to release it for that purpose. Jurisdiction of the ancillary court was said to be in aid of proceedings in the court of primary jurisdiction, and in subordination thereto. He held that the expression in *Fidelity Trust Co. v. Gaskell* (C. C. A. 8), 195 Fed. 865, to the effect that the ancillary court had jurisdiction to hear and adjudge the claims of intervenors to liens upon the property, and to apply the proceeds to the discharge of the claims or send them to the court of original jurisdiction, was merely dicta, and expressed the view that the ancillary court had the right only to determine whether property so seized is in fact the property of the bankrupt. That question "does not involve the very different question whether, if it be determined to be the property of the bankrupt, the court having seized it by virtue of its ancillary jurisdiction, in aid of the court of primary jurisdiction, has the right, regardless of that court, to determine and dispose of liens upon it as it may see proper, and merely transmit the final proceeds to the court of primary jurisdiction. * * * "

> "I am constrained to conclude that the view expressed obiter in this opinion that the court of ancillary jurisdiction had such plenary power in the administration of liens upon the property of the bankrupt is in conflict with the subsequent opinion of the Supreme Court in Lazarus v.

Prentice, 234 U. S. 262, in which it was said:

* * *

"That the court of original jurisdiction acquired the full right to administer the estate

* * *

"And that the ancillary court had authority to appoint a Receiver and take charge of the bankrupt's estate, 'in order that the same might be turned over to the bankruptcy court having jurisdiction for administration.'"

Process Which Results in Any Interference With the Property in Custody of the Bankruptcy Court Is Absolutely Void

In Cohen v. Nixon & Knight, (D. C. Ga.), 236 Fed. 407, it was held that after property of a bankrupt which was in his possession at the time of the bankruptcy has come within the jurisdiction and custody of the Bankruptcy Court, by virtue of the filing of the petition, and the subsequent adjudication a creditor holding a note or secured lien thereon cannot acquire title to or possession of the property or become an adverse claimant and exclude the jurisdiction of the Bankruptcy Court to determine his rights by a summary proceeding. A creditor holding a mortgage under which the mortgagee remains in possession, but under which a power of sale is granted cannot exercise such right after the property has passed into the possession of the Trustee without the permission of the Bankruptcy Court. Any such sale while the property is in custodia legis is void and does not divest the title of the Trustee. The petition in this

case is an extensive one, and deals with the authorities in an extremely intelligent manner. The holding of the court is in line with the decisions *In re Jersey Island Packing Company* (C. C. A. 9), 138 Fed. 625, from which the following quotation is taken:

> "It is true that the Bankruptcy act provides that liens such as the lienholders had under the deeds of trust in this case, shall not be affected by bankruptcy, but that is far from saying that such lienholders may, after the commencement of proceedings in bankruptcy against the debtor proceed to enforce their liens or contracts in the manner prescribed in the instruments which create them, and this is true whether such lien is an ordinary mortgage or a deed of trust, with provision for a strict foreclosure by a notice and sale. The provision of the Bankruptcy Act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lien. It does not have reference to his remedy to enforce the claim.

[illegible]

[illegible]

> the property did not bring its full value. In the opinion of the court not only does the bankruptcy law itself, but public policy as well, require that the court shall set aside such a transaction as the one under consideration, although in this case defendants appear to have acted in good faith, and not to have been guilty of fraud. Otherwise, the bankruptcy law would be set at naught, and the door of fraud opened and the proper administration of estates in bankruptcy seriously hampered."

Although this is a District Court opinion, it was cited with approval by Judge Sanford in *re North Star Ice & Coal Co.*, 252 Fed. 301, the Circuit Court of Appeals for the Eighth Circuit in *First Trust & Savings Bank v. Butler*, 282 Fed. 866, and *First Trust Company v. Baylor*, 1 Fed. (2d) 24, but the District Court of Texas refused to follow it in principle in *re Schmidt*, 3 Fed. (2d) 40.

In *Loisel v. Dornier* (D. C., La.), 213 Fed. 396, it was held that after the filing of an involuntary petition in bankruptcy the State Court had no jurisdiction to grant process to foreclose a mortgage on real estate of the bankrupt, and its order of sale was void, since the jurisdiction of the Bankruptcy Court vested on the filing of the petition.

It was also held that a Trustee in Bankruptcy, by applying to a State Court to set aside an order granting process for foreclosure could not impair or affect the jurisdiction of the Bankruptcy Court to enjoin the foreclosure, the court saying:

"No action of the Trustee could impair or affect the jurisdiction of this court over the bankrupt's estate."

If a State Court First Has Jurisdiction Which Is Not Avoided by the Bankruptcy Proceeding, It Retains It

In *Fort Dearborn, etc. Bank v. Smalley* (C. C. A. 8), 298 Fed. 45, it was held that as to property not in possession of the Bankruptcy Court, the Bankruptcy Court had no authority to enjoin a foreclosure suit in a State Court, the mortgage not having been avoided by the bankruptcy

In *Whitney v. Barrett* (C. C. A. 5), 28 Fed. (2d) 760, it was held that a foreclosure proceeding instituted prior to bankruptcy could proceed without interference by the Bankruptcy Court.

In *Conservative Mortgage, etc. Company* (C. C. A. 6), 24 Fed. (2d) 38, it was held that the Bankruptcy Court's jurisdiction was paramount and exclusive, and that it was entitled to possession of all property not held adversely by the State Court Receiver; that a levy upon property more than four months next preceding the bankruptcy effected a lien, which was not avoided by the bankruptcy, and that where the State Court had such possession its authority was paramount.

The opinion of Justice Sanford in the *Dayton case*, 291 Federal 390, was followed with approval.

In *Re Gillette Realty Company* (C. C. A. 9), 15

Fed. (2d) 193, it was held that Courts of Bankruptcy are wtihout power to restrain state suits pending to bankruptcy to foreclose mortgages.

In *Bailey v. Blackmon* (C. C. A. 4), 14 Fed. (2d) 16, it was held that Federal Courts may stay proceedings in State Courts begun prior to proceedings in bankruptcy, where such would embarrass the equitable distribution of the bankrupt estate. The court reached this conclusion by reasoning that while the rules of comity between courts should be respected, it was unnecessary to respect a State Court action which would result in violations to the rights of the bankrupt estate, citing the *Watts case*, 190 U. S. 1.

In *Re Bennett* (C. C. A. 7), 285 Fed. 351, because the property in controversy had never been in possession of the Trustee, or in the custody of the Bankruptcy Court, it was held the Referee had no jurisdiction to entertain an application to enjoin a subsequent proceeding in the State Court.

In *Re Hoey, Tilden & Co.* (D. C., N. Y.), 292 Fed. 269, it was held that a prior suit in a State Court to establish a trust in specific property would not be enjoiner by the Bankruptcy Court after bankruptcy intervention, even though it was recognized that the bankruptcy court's jurisdiction to administer the estate of an insolvent is exclusive and paramount. The custody of the property was held to be in the State Court.

In *Re Dayton Coal & Iron Co.* (D. C., Tenn.), 291 Fed. 390 (by Mr. Justice Sanford, then District

Judge), was involved the question whether a Chancery Receiver, appointed prior to the bankruptcy proceedings, was entitled to possession of certain mortgaged property, the subject of the suits in the State Court, as against the Trustee in Bankruptcy. The validity of the mortgages was attacked in both the bankruptcy proceeding and the State Court proceeding. The State Court held the mortgages valid. The Trustee in Bankruptcy, after his appointment, applied to the State Court for surrender to him of the property in question, which was granted. The mortgagee presented in the Bankruptcy Court the State Court proceedings and prayed that this mortgage be declared valid. The Trustee contested the validity of the mortgage and of the State Court proceedings, by reason of the pendency of the bankruptcy proceedings. The Referee held the State Court proceedings were void and that the mortgage was also void.

The Court held that property in the possession of the bankrupt at the time of the filing of the petition became impounded and was subject to the exclusive jurisdiction of the Bankruptcy Court; that such custody does not extend to property otherwise held; that the adjudication does not terminate the prior jurisdiction of a State Court in a suit to foreclose a mortgage, or an attachment filed more than four months before the filing of the petition, and that the mere filing of the petition does not operate to oust the actual possession of the State Court even where the State Court's possession is based upon a lien or receivership, which is avoided by the act. That "it is a general and funda-

to the State Court for surrender of the property in its custody, and finally that as the property in question was not in possession of the bankrupt at the time the petitions were filed but was in custody of the State Court, the bankruptcy proceedings did not operate to suspend the jurisdiction of the State Court in the matter.

In *Re Rosen* (D. C. Ga.), 262 Fed. 527, it was held that a suit in foreclosure of a lien instituted prior to the bankruptcy proceeding, and which was not invalidated thereby, would not be enjoined.

If a State Court Has Jurisdiction or Custody By Process Which Is Avoided by Bankruptcy, the Latter Court Is Entitled to Possession

In *Penny* (C. C. A. 9), 20 Fed. (2d) 638, it was held that the jurisdiction of the courts of bankruptcy is exclusive of all other courts except as to proceedings in bankruptcy and administrative matters. The rule was applied as against equity receivers whose appointment was superseded by the appointment of Receivers in Bankruptcy.

In *Re Florence Commercial Co.* (C. C. A. 9), 19 Fed. (2d) 108, property of the bankrupt had been seized by taxing officials before the adjudication, but it was held that the Trustee in Bankruptcy was entitled to possession thereof, and the court discounted the theory advanced that if the Trustee desired to protect the estate he could pay the taxes, by holding that the Trustee was primarily entitled to possession.

and there the question of the right to pay off the taxes and secure the property could not be considered.

In *Gealey v. South Side Trust Co.* (C. C. A. 3), 249 Fed. 189, it was held that while a petition in bankruptcy filed subsequent to the appointment of a receiver in the State Court supersedes the State Court proceedings, yet as a matter of comity, as the property in possession of the receiver, is in custodia legis, surrender thereof must be directed by the State Court, and the receiver could not voluntarily surrender the same.

In *Re Dooley Motor Car Corporation* (D. C., Tenn.), 16 Fed. (2d) 142, a conflict between a Receiver appointed by a State Court within four months prior to the bankruptcy, and the bankruptcy Receiver was involved. The court held that it had jurisdiction to enjoin the State Court proceedings, and that such procedure could not be relinquished by the court.

In *Grafton Gas & Electric Light Company* (D. C., W. Va.), 253 Fed. 668, foreclosure proceedings had been instituted and receivers appointed prior to the bankruptcy. The question arose whether the Bankruptcy Court should take possession of the mortgaged property and stay the proceedings in the State Court, or not, and holding that the four months period was not to be considered in connection with the question that the jurisdiction of the Bankruptcy Court was exclusive, and that from the nature of a bankruptcy proceeding possession and administration of the property involved by that court was necessary. It was

held that the Bankruptcy Court was entitled to possession and the State Court restrained.

A Pledge or Mortgagee in Possession of Property Under a Valid Agreement Is Entitled to Retain It and Enforce His Agreement Under the State Law as Against the Trustee Generally Speaking

Robinson v. Kay (C. C. A. 9), 7 Fed. (2d) 576, was like the *In re Smith*. Notice of sale under a power contained in the mortgage was posted prior to the filing of the bankruptcy petition, and the sale had thereafter. The Trustee, upon his appointment, brought suit to set aside the sale on the ground that at the time it was made the property was in custodia legis, having been attached by the filing of the bankruptcy petition. On authority of the Hiscock case, of which it was said that the Supreme Court did not base its decision on the ground that the property was not in possession of the bankrupt, but that the rights of the creditors to the enforcement of their lien given by a local law was the basis of the decision, held that the Trustee had only the bankrupt's title, subject to the mortgage; that the lienholder, unless restrained by the Bankruptcy Court, may enforce his lien independent of that court, and that the Bankruptcy Court could have regulated the sale had it so desired.

In *Duncan v. Fox* (D. C., Fla.), 300 Fed. 165, it was held that the Bankruptcy Court was without jurisdiction of a suit by the Trustee in Bankruptcy to cancel a mortgage after a foreclosure suit instituted

after the bankruptcy had proceeded to judgment, the Trustee making no defense therein. The bankrupt, however, was not in possession at the time the State foreclosure proceeding was instituted.

In Re Southern Pharmaceutical Co. (D. C., Tenn.), 286 Fed. 148 (by Sanford, District Judge), it was held as dicta that a pledgee may, unless restrained by the Bankruptcy Court, enforce his security dehors the court.

In Re North Star Ice Company (D. C., Tenn.), 252 Fed. 301 (by Sanford, District Judge), was involved the question whether or not a mortgagee was entitled to object to the manner or method of sale of the mortgaged property where it was to be made "subject" to valid liens or incumbrances. The court held that the rights of the mortgagee were not affected, and that it had no standing to seek a revision of the order of the referee, but in passing stated that the Trustee took only the bankrupt's equity, that the validity of pre-existing liens is not affected; that the lienholder may, unless restrained by the Bankruptcy Court, enforce his lien dehors the court, that the Bankruptcy Court might regulate the method of enforcing the lien. That if the property comes into the possession of the Bankruptcy Court it may be sold free of the lien, that the court may sell the property subject to the incumbrance, leaving the lienor to enforce his lien.

Ward v. Bank of Ironton (C. C. A. 6), 202 Federal 609, and *In Re Goldsmith* (D. C., Texas), were cited in support of the statement that the lienholder may enforce the same dehors the court unless restrained.

In the former case a pledge was involved, and it was held that the pledge was valid, and the property delivered so that the Bankruptcy Court had never acquired possession of the property. In the latter case it was simply held that a secured creditor need not prove up his secured claim in accordance with the Bankruptcy Act in order to reach the proceeds of a sale of the secured property by the Bankruptcy Court free of liens.

Contra, *In Re Smith* (D. C. Texas), 3 Fed (2d) 40, it was held that as there was no equity in the property involved, and foreclosure proceedings under a power contained in a deed of trust where notice was posted before and the sale had after bankruptcy was valid. The Court recognized that the property was in custodia legis, that valid liens were not affected by the bankruptcy proceeding, and that had a foreclosure suit been instituted prior to the bankruptcy in the State Court, the State Court could have proceeded. The cases of *In Re Hosie*, 206 Fed. 789, and *Pugh v. Lowe*, 219 Fed. 417, were criticized, and it was held that if the property was in custodia legis it could not be interfered with by the foreclosure sale. The Court attempted to apply the *Hiscock case*, 206 U. S. 28, and holding that, as the notice of sale were filed and posted prior to the filing of the petition, the property was in the possession of the Trustee, under the trust, and did not pass to the Trustee in Bankruptcy. The decision was affirmed in (C. C. A. 5) 8 Fed (2d) 1021, on the ground that there was no equity for the estate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

B. K. ISAACS, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT ..... *Appellant,*

v. No. 72

HOBBS TIE & TIMBER COMPANY, A CORPORATION *Appellee.*

APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FROM WHICH A CERTIFIED QUESTION IS SUBMITTED.

BRIEF OF APPELLEE

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Appellant,

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Appellee.

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BRIEF OF APPELLEE

STATEMENT OF FACT

On the 27th day of September, 1921, J. L. Cunningham and wife, Henrietta E. Cunningham, made, executed and delivered to the Holland Banking Company of Springfield, Missouri, their promissory note in the sum of $76,000, due and payable on the first day of October, 1924, bearing interest at 7 per cent, and on the same day, and to secure said note, together with

the interest thereon, made, executed and delivered to said bank a mortgage deed covering about 12,000 acres of rough timber land in Northwest Arkansas.

There were several payments from time to time on the above mortgage, thereby keeping it from becoming barred by the Statute of Limitations, until the 19th of March, 1929, there was due, with principal and accrued interest, approximately $66,000.

The Holland Banking Company in the summer of 1926 became insolvent and was taken over by the State Banking Department of the State of Missouri for liquidation, and among its assets was this Cunningham note and mortgage. On the 20th day of October, 1928, the liquidating agent of the Holland Banking Company applied to the circuit court of Greene County, Missouri, which court had jurisdiction over the liquidation of State banks in that county, for an order of sale of said note, and the same was sold to the appellee Hobbs Tie & Timber Company at and for the sum of $30,000, which sale was duly approved by said court. At that time the equity of redemption in the above lands was in T. P. Perkins of Palo Pinto, Texas, the same having been deeded to him by the Cunninghams on the 18th of April, 1924, subject to the mortgage of the banking company, the deed being a straight warranty deed without disclosing any trust, and thereafter Perkins made several payments on the note. Soon after this J. L. Cunningham died, and whatever interest he had in the equity of redemption, if any, went to his widow, the present bankrupt. On the 29th day of October, 1928,

nine days after the note had been purchased by the appellee from the Holland Banking Company, a deed was filed from T. P. Perkins to the appellant, trustee in bankruptcy, subject to the mortgage of the Holland Banking Company. On the 14th day of September, 1928, the said Henrietta E. Cunningham was adjudicated a bankrupt by the District Court of the United States for the Northern District of Texas and the Fort Worth Division, and the appellant was appointed trustee in bankruptcy.

On the 12th of December, 1928, the Hobbs Tie & Timber Company filed its suit in the chancery court of Benton County, Arkansas, the county in which a large portion of the lands were located, a suit to foreclose the mortgage executed in 1921 by Cunningham and wife, and the appellant, as trustee in bankruptcy, was made a party to that suit, and constructive service issued, and on the 10th day of January, 1929, the appellant, as trustee in bankruptcy, entered his voluntary appearance in the Benton County, Arkansas, Chancery Court, and filed a petition for removal of the case to the District Court of the United States for the Western District of Arkansas and the Fort Smith Division thereof, on the ground of diversity of citizenship (Tr. 15). Upon this petition an order of removal was made by the chancellor (Tr. 18), and the cause was transferred to the District Court of the United States for the Western District of Arkansas and the Fort Smith Division, and on the 11th of February, 1929, the appel-

lant, as trustee in bankruptcy, filed an answer in said court (Tr. 20-25).

In this answer the validity of the lien of the appellee was admitted; the amount due on the note was admitted, and all of the material allegations of the petition to foreclose were admitted, but he alleged that there was an equity of some sixty thousand dollars in the real estate sought to be foreclosed, and that the plaintiff was foreclosing hoping to be able to buy the property at the foreclosure sale for the amount of the indebtedness, and that the United States District Court for the Western District of Arkansas was without jurisdiction to order a sale to satisfy the lien.

On February 28, 1929, the appellee filed a motion to dismiss the answer and for judgment on the pleadings (Record 26), setting up that the answer set forth no defense to the foreclosure proceedings; that the validity of the note and the lien on said lands was admitted; the amount alleged to be due was admitted, and that all allegations made in the answer in reference to the value of the equity was a matter that could be taken care of and preserved in the distribution of the proceeds of the sale of the real estate, and this motion asked that the answer be dismissed so far as it undertook to delay the foreclosure, or to its allegations in reference to a want of jurisdiction of the court. There was an amendment filed, alleging that on the 14th of September, 1928, the day that the trustee in bankruptcy was appointed, the referee for the Bankrupt Court of the Northern District of Texas had made an

order authorizing and directing the trustee to "offer for sale and sell all or any part of the estate of the bankrupt aforesaid at public or private sale, for cash or on terms, and subject to or free of liens."

The motion for judgment on the pleadings was argued on the 19th of March, 1929, and a decree was rendered ascertaining the amount due under the mortgage, declaring it to be a first and prior lien against the lands covered by the mortgage, and a sale was ordered to satisfy the lien, and a special master appointed to carry out the decree. This sale was advertised for the 6th day of May, 1929. In the meantime the appellant had perfected an appeal to United States Circuit Court of Appeals, and, as the record discloses, on the 23rd day of May an application was made to that court sitting at Kansas City, for a stay of the sale without a bond being executed by the trustee. Upon a hearing this motion was denied, but the appellant was given the privilege, under an order, of executing a bond for $3,500 to pay interest that might accrue after the 6th of May, and all costs. This bond was not given, and the sale was duly held on the 6th of May, and the land sold by the master for the amount of the judgment, interest and costs to that date.

It will be observed that neither the Holland Banking Company, the prior holder of the mortgage, nor the Hobbs Tie & Timber Company, which purchased it from the Bank Commissioner of the State of Missouri, entered any appearance in the bankruptcy court for the Northern District of Texas and filed no claim

[illegible]

effect that the mortgagee may elect whether to foreclose in the bankruptcy court or not and "coupled with that assertion is the assumption that there is no restriction of his right to proceed elsewhere." In reply to this, will say that we think they are entirely in error, and that the right of the mortgagee under the facts in this case, to elect whether he will proceed to foreclose in some other court and remain out of the bankrupt court is a matter entirely within his rights.

FILING A PETITION TO REMOVE FROM THE STATE COURT AND INVOKING THE JURISDICTION OF THE UNITED STATES DISTRICT COURT, THE APPELLANT WOULD BE ESTOPPED TO QUESTION THE JURISDICTION OF SAID COURT TO WHICH HE PROCURED A REMOVAL.

The appellant herein, in paragraph five of his answer, as set forth on page twenty-two of the record in this case, raises the sole question involved on this appeal by objecting to the jurisdiction of the trial court, in the following language:

"This honorable court has no power, jurisdiction or authority by reason of the premises to administer upon said property by determining when the same shall be sold, how the same shall be sold, or to order a sale thereof, these matters being solely and exclusively matters of administration for the District Court of the United States for the Northern District of Texas at Fort Worth sitting in bankruptcy."

And the only relief prayed for by appellant in his answer is as follows:

"Wherefore this defendant prays that, upon hearing hereof, the court establish and fix the lien, claims and interest of the plaintiff and the various defendants herein, and thereupon proceed further with this suit; that the prayer of the plaintiff that said property be ordered sold be in all things denied."

The only question raised by appellant in the trial court was as to the jurisdiction of said court to order a sale of the property and lands involved. The appellee, in effect, demurred to this answer or allegation that the trial court had no jurisdiction to make an order of sale, and we submit that this question has been settled by the decisions of this court and the various Circuit Courts of Appeal, in the case of *Tootle et al.* v. *Coleman et al.*, 107 Fed. 41, 45 said:

> "It follows from this conclusion that the State court obtained sufficient jurisdiction of the subject of this action and of the defendants by the garnishment and the service of the summons upon the defendants by publication to authorize the disposition of the moneys due from the garnishees by the judgment of the court, and the defendants are estopped by their removal of the cause from attacking the jurisdiction of the Federal court on any other ground. It does not lie in the mouth of one who has removed a case from the State to the Federal court to claim that the latter has no jurisdiction of the case, except upon the ground that the court from which it was removed was without jurisdiction. *Cowley* v. *Railroad Co.*, 159 U. S.

569, 583, 16 Sup. Ct. 127, 40 L. ed. 263; *Purdy* v. *Wallace Muller & Co.* (C. C.) 81 Fed. 513, 515."

In the case of *Cowley* v. *Railroad Co.*, 159 U. S. 569, 583, which is cited by Judge Sanborn in the above opinion, the Supreme Court of the United States said:

> "The case having been removed to the circuit court upon petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction."

It is nowhere contended by appellant that the court from which this case was removed, to-wit, the chancery court of Benton County, Arkansas, had no jurisdiction to hear and determine the matters alleged in plaintiff's complaint, and it was upon appellant's petition that the cause was removed to the United States District Court, and having invoked the jurisdiction of that court, we submit it does not lie within his mouth to claim that such court had no jurisdiction to make the order of sale or to make any final disposition of the case in that court.

The appellant argues strenuously that the bankruptcy court for the Northern District of Texas had complete administrative jurisdiction of the estate of the bankrupt, and for that reason we were precluded from seeking a remedy in the lower court, and cites many authorities on the general proposition of a conflict between bankruptcy courts of primary jurisdiction and courts of ancillary jurisdiction, none of which

are applicable to the facts in this case. The appellant assumes a very arbitrary position in this case. If his contention is true, let us see what the effect would be. If a resident of New York, California or the Hawaiian Islands should own real estate in Arkansas and on which he had executed a mortgage thereby transferring the legal title to the mortgage many years ago, should go into bankruptcy through the bankruptcy court of the district in which he resides, then under the contention of the appellant, before the mortgagee could foreclose the lien, about which there is no question as to its validity, he would have to go to the bankrupt court in New York, California or the Hawaiian Islands, as the case might be, and submit himself to the jurisdiction of that court and seek a foreclosure therein or procure a waiver of the trustee to any claim to the equity of redemption, and if that court saw fit to deny the right to foreclose, he would necessarily have to go to the appellate court of that district, procure a reversal, then an order, and come back to the local jurisdiction to assert his rights.

The appellant relies specially on the cases of *Robertson* v. *Howard*, 229 U. S. 254; *Herbert* v. *Crawford*, 228 U. S. 204; *Murphy* v. *Hoffman*, 211 U. S. 562; *In re Patterson Lumber Company*, 247 Fed. 578; *Lazarus* v. *Prentice*, 234 U. S. 263; and other similar cases.

In this case we do not think it should be conceded that the District Court of the United States for the Western District of Arkansas, at the time the decree

was rendered in this case, was sitting as an ancillary court of bankruptcy. This was a bill in equity to foreclose a mortgage, but conceding for the sake of argument that it was sitting as an ancillary court, we then contend that it did have jurisdiction to foreclose the mortgage and order the sale.

In re Rodgers v. *Garrett Timber Co.*, 22 Fed (2) 571, is a case which lays down the true rule and which has been followed by this court and in other decisions which we shall later cite. Judge Coleman of the District Court for the District of Maryland says as follows:

> "In the nature of things, an ancillary receiver must be subject alone to and obey the orders of that court of which he is an officer, so obeying it follows that to it alone he must account. Any other course would breed confusion in the administration and go far towards making the exercise of ancillary jurisdiction impracticable, and if a court, in pursuance of comity, undertakes to exercise ancillary jurisdiction by administering local assets which it alone has power and jurisdiction to administer, it follows that his hand must be free to administer by its own officer and to exact from him the full measure of duty, such executive work it can only secure from an officer answerable to it alone. *Kirker* v. *Owings*, 98 Fed. 511; *Sands* v. *Neeley*, 88 Fed. 133; *In re Isaacson*, 174 Fed. 406; *Ames* v. *U. P. Ry. Co.*, 60 Fed. 966."

The court further in that opinion says:

> "The weight of authority supports what seems to be the proper rule, namely, that a court

of ancillary jurisdiction has power to determine priorities and liens in regard to property brought within its jurisdiction, and to pass such orders as may be necessary in connection with the *satisfaction of same. Fidelity Trust Co.* v. *Gaskell* (C. C. A.), 195 Fed. 865; *Emerson* v. *Castor, supra; In re Einstein* (D. C.) 245 Fed. 189; *Story & Clark Piano Co.* v. *Holmes* (C. C. A.) 251 Fed. 565; *Murphy* v. *John Hoffman Co.*, 2 U. S. 562."

In the case of *In re Patterson Lumber Company*, one of the cases relied upon by the appellant in this case, the above principle was doubted on the authority of *Lazarus* v. *Prentice*, 234 U. S. 263, but a careful examination of the Lazarus case discloses that the court there held that an ancillary jurisdiction could not decide whether a claim arising *subsequent* to bankruptcy ought to be allowed.

The facts in the Lazarus case, relied upon by appellant, are that Antonio Musica & Phillip Musica were partners in New York City; that they became largely indebted, and on involuntary petition were adjudicated bankrupts on the 19th of March, 1913, and a receiver was appointed, and on the same day the petition was filed the bankrupts were arrested as fugitives from justice in the city of New Orleans. Upon search there was found upon their persons $75,000 in money and $50,000 in notes and mortgages. Upon the admission of the parties it was practically apparent that the property belonged to the bankrupt estate, and upon a petition filed by the receiver from the New York court the District Court of the United States for the Eastern

District of Louisiana ordered the property turned over to the receiver from the bankrupt court of New York.

Lazarus, Michael & Lazarus, a firm of lawyers in New Orleans, filed an intervention claiming a fee of $15,000 for representing the Musicas in that proceeding against them in the courts of Lóuisiana, and asked the court to allow the fee and subject the fund taken from the person of the bankrupt to its payment. The petition was dismissed on the grounds that the fund at that time was in *custodia legis* in the bankruptcy court of New York, and that the claim would have to be presented there. An appeal was taken to the Court of Appeals, which affirmed the lower court, and to the Supreme Court of the United States, and the court in that opinion says:

> "The filing of the petition and adjudication in the bankrupt court in New York brought the property of the bankrupts, wherever situated, into *custodia legis*, and it was thus held from the date of the filing of the petition, so that *subsequent* liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law."

It will be noted from the opinion in this case that the court was simply passing upon the right of the parties to the enforcement of an alleged lien sought to be acquired *after* bankruptcy over an alleged lien sought to be enforced after bankruptcy, and with reference to a fund or personal property which was in the

actual and physical possession of the bankruptcy court of original jurisdiction, and the court further says:

> "There is no contention that Lazarus, Michael & Lazarus had any lien upon this property at the time of the apprehension of the parties and the seizure of the property. Whatever rights they had are asserted to arise by virtue of the assignments made April 1, 1913, and *after the filing* of the original petition in bankruptcy."

In the other leading case relied upon by appellant, the case of *Robertson* v. *Howard*, 229 U. S. 254, in which it was held that the court of primary jurisdiction had the right to sell certain certificates of purchase of lands owned by the bankrupt, the bankruptcy court being in the Southern District of Illinois, and a certificate of purchase covering lands in the State of Kansas, the facts are that the bankrupt in that case was adjudicated in the Southern District of Illinois. The bankrupt was the owner by assignment of two certificates, each reciting the purchase from the State of Kansas of a particular quarter section of school land and of making of a partial payment therefor and the right to receive from the State a deed to the land upon the payment of the balance due. The certificates were placed in the bankruptcy schedules. Upon the petition of the trustee the referee ordered the sale at public auction, after ten days' notice by publication in a newspaper of general circulation published in Cass County, Illinois, and the certificates were sold under that order. Afterwards the controversy came up about the juris-

diction of the bankrupt court in the Southern District of Illinois to order these certificates sold, between a purchaser of the lands at a tax sale and the assignee in bankruptcy of these certificates, the assignee of the certificates having tendered the money to pay all taxes and having paid the State of Kansas the balance due under the certificates, and no question was raised as to the validity of the certificates, and the Supreme Court held that, as only the certificates of purchase were sold, it was unnecessary to comply with the Federal statutes providing the manner of sale of real estate of the bankrupt, and that the district court in Southern Illinois therefore had jurisdiction.

In the other case of *Dayton* v. *Stanard*, 241 U. S. 588, relied upon by appellant, the matter involved was the attempted enforcement of a lien attempted to be acquired after bankruptcy, and all of the other authorities cited in appellant's brief, after a careful study and reading of these authorities, we find involved liens in the same condition and not liens acquired many years prior to bankruptcy, as in the instant case, and in regard to which there was no question as to the validity.

In the Fourth Circuit Judge Waddill, in *Tidewater Plumbing Company* v. *Schimmel*, 296 Fed. 459, held, following *Lazarus* v. *Prentice*, *supra*, that proceedings to recover funds expended by the bankrupt *after* bankruptcy ought not to be allowed in an ancillary jurisdiction, and said:

"While there are many cases in which courts of ancillary jurisdiction should administer the fund under their control settling and determining the liens thereon and the rights of the parties thereto, still a case like this, with the fund not actually in court, the same being confessedly a part of the bankrupt's estate and diverted *after* the bankruptcy, it should be paid and transferred over to be administered under decrees and orders of the court of original jurisdiction."

This court has repeatedly refused to follow the rule contended for by appellant, and in the case of *Fidelity Trust Company* v. *Gaskell*, from this court, reported in 195 Fed. page 865, opinion by Judge Sanborn, the very questions involved by this appeal are thoroughly discussed, and in that opinion he says:

"It is true that prior to the year 1910 this court was of the opinion that the district courts of the United States had no ancillary jurisdiction in bankruptcy proceedings, and that the court of original jurisdiction had the power to determine the title, the right to the possession and the existence of liens upon specific property claimed as a part of the bankrupt's estate situated in other districts, and the power to enforce its decisions in those districts. *In re Granite City Bank*, 137 Fed. 818, 70 C. C. A. 316; *In re Dempster*, 172 Fed. 353, 355, 356, 97 C. C. A. 51. But in January, 1910, the Supreme Court decided, in *Babbitt* v. *Dutcher*, 216 U. S. 102, 110, 114, 30 Sup. Ct. 372, 54, L. ed. 402, 17 Ann. Cas. 969, and in *Elkus, Petitioner*, 216 U. S. 115, 117, 30 Sup. Ct. 377, 378 (54 L. ed. 407), that the respective district courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in

aid of proceedings pending and being administered in the district court of another district, and the Congress in June of that year enacted that the district courts 'are hereby invested within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held to * * * (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits, in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy. Bankr. Act July 1, 1898, c. 541, 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), as amended by Act June 25, 1910, c. 412, 2, 36 Stat. (Part. 1) 839 (U. S. Comp. St. Supp. 1911, p. 1491).

"Moreover, it seems to be settled by the decisions in *Babbitt* v. *Dutcher*, and other cases, that the limitation of section 2 of the Bankruptcy Act of the jurisdiction granted to the district courts in bankruptcy to 'their respective territorial limits' restricts the exercise of the power of a district court in which a petition in bankruptcy is filed to its own district, and that it may not enforce its process or its order for the delivery of property without the territorial limits of its district. *Lathrop* v. *Drake*, 91 U. S. 516, 517, 23 L. ed. 414; *Babbitt* v. *Dutcher*, 216 U. S. 102, 110, 30, Sup. Ct. 372, 54 L. ed. 402, 17 Ann. Cas. 969; *Staunton* v. *Wooden*, 179 Fed. 61, 64, 102 C. C. A. 355; *In re Peiser* (D. C.) 115 Fed. 199, 200; *In re Sutter Bros.* (D. C.) 131 Fed. 654; *In re Benedict* (D. C.) 140 Fed. 55; *In re Robinson* (D. C.) 179 Fed. 724.

"It is therefore no longer true that one court, the court making the adjudication in bankruptcy, takes exclusive jurisdiction and alone collects and determines the titles to and liens upon the property wherever situated claimed as part of the estate of the bankrupt. It was undoubtedly because this was not true, and because the court of primary jurisdiction in New York had no power to enforce its process or its order for the seizure or delivery of the property here in question situated in the State of Missouri, that the ancillary jurisdiction of the court below was invoked. The earlier conclusion of this court, therefore, to the effect that the district courts sitting in bankruptcy had no ancillary jurisdiction, and the arguments in its opinions that were believed to sustain that view, are no longer authoritative. We turn to the consideration of the rights and remedies of parties under the decisions of the Supreme Court and the Act of Congress, to which reference has been made.

"A proceeding in bankruptcy is a proceeding in equity, and a district court sitting in bankruptcy, whether it is exercising its primary or its ancillary jurisdiction, is a court of equity. It is an established principle of equity jurisprudence that whenever a court of chancery takes into its legal custody, and thereby withdraws and withholds property from replevin, attachment, or other legal proceedings, it hears and adjudges the claims to the title and to legal and equitable liens upon that property of all parties who intervene in the suit or proceeding before it in their own behalf and submit their claims to its adjudication. By this rule the power inhered in and the duty was imposed upon the court below to hear the petition of the intervener to decide whether the stock of goods seized and held was the property of the

bankrupt's estate or of the Beeson firm, and according to its decision to deliver its proceeds to the trustees of that estate or to the Beeson firm and its creditors."

This court in that decision, defining what *custodia legis* means, further says:

"It is true that the Supreme Court once said that the filing of a petition in bankruptcy 'is a caveat to all the world and in effect an attachment and injunction' (*Mueller* v. *Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. ed. 405), that the adjudication in bankruptcy puts the property of the bankrupt in *custodia legis*, and that its title vests in the trustee upon his appointment. But the later decisions of that court adjudge that the statement quoted applies only to parties who have no substantial claim of a lien upon or title to the property claimed as that of the bankrupt, and that against those who have such claims of existing titles or liens when the petition in bankruptcy is filed, its filing is neither a caveat nor an attachment, that it creates no lien, and that they are strangers to the proceedings in the absence of an order or process making them parties, or some equivalent notice. *Jaquith* v. *Rowley*, 188 U. S. 620, 625, 23 Sup. Ct. 369, 47 L. ed. 620; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, 352, 353, 26 Sup. Ct. 481, 50 L. ed. 782; *Hiscock* v. *Varick Bank of New York*, 206 U. S. 28, 41, 27 Sup. Ct. 681, 51 L. ed. 945; *In re Ratham*, 183 Fed. 913, 924, 106 C. A. 253."

This court, in *Fidelity Trust Company* v. *Gaskell*, *supra*, further says:

"Ancillary jurisdiction is a term which has a plain and well-known meaning in the equity juris-

prudence of the United States, a meaning fixed by settled practice and adjudged by the uniform current of the decisions of the courts of the United States. As neither the court nor the Congress modified or limited the term, the unavoidable presumption is that they used it, and intended to use it, in its recognized legal significance. In that significance, ancillary jurisdiction includes the power to hear and adjudge, at the request of interveners, their claims of title to, or legal or equitable liens upon, the property it takes, or holds in its legal custody, by virtue of that jurisdiction and to send the proceeds to the court of original jurisdiction, *or to apply it to the discharge of the claims* of the interveners in accord with its decision. *Sands* v. *E. S. Greeley & Co.*, 88 Fed. 130, 132, 31 C. C. A. 424; Streets Federal Equity Practice, 1560; *Clyde* v. *Richmond & D. R. Co.* (C. C.) 65 Fed. 336, 338, 340; *McGraw* v. *Mott*, 162 Fed. 1006, 87 C. C. A. 678; *McGraw* v. *Mott*, 179 Fed. 646, 654, 103 C. A. 204; *Chattanooga Terminal Ry. Co.* v. *Felton* (C. C.) 69 Fed. 273, 283, 285; *Central Trust Company* v. *East Tennessee, V. & G. Ry. Co.* (C. C.) 69 Fed. 658, 663; *Jones* v. *Central Trust Co.*, 73 Fed. 568, 19 (C. C. A.) 569. A court exercising ancillary jurisdiction acts independently of the court of primary jurisdiction, or of its officers, and for itself. It appoints its own receiver, generally the same person appointed receiver by the court of primary jurisdiction, but in the seizure, management, sale, and distribution of the property seized within the territorial limits of the district, of which it takes the legal custody, this receiver is, and must be, governed by its orders exclusively. He may not justify any action by any orders of the court of primary jurisdiction. *Kirker* v. *Owings*, 98 Fed. 499, 511, 39 C. C. A. 132, 144;

Reynolds v. *Stockton*, 140 U. S. 254, 272, 11 Sup. Ct. 773, 35 L. ed. 464."

From the above decisions of this and the Supreme Court of the United States, we think it is well settled that the court of ancillary jurisdiction has power to determine liens in regard to property within its jurisdiction and to pass such orders as may be necessary in connection with the *satisfaction* of such liens, such as a decree of foreclosure, the appointment of a master or receiver to carry out the same.

ORDER OF REFEREE TO SELL FREE OR CLEAR OF LIENS

The appellant relies upon an order made by the referee in bankruptcy for the Northern District of Texas directing the trustee to sell the property of the bankrupt free or clear of liens, at public or private sale, for cash or on time.

This order, if carried out, would have been void as to the appellee, the appellee not having been brought into the bankrupt court by any notice and the trustee being without authority, without an ancillary proceeding of the court in the jurisdiction in which the land was located, to have sold same.

The bankrupt court may in a proper case order the property of a bankrupt to be sold free of encumbrance, upon a proper application to the referee by the trustee, setting forth grounds therefor, and notice and summons to secured creditors to appear and de-

fend, otherwise, if the sale is made "free of liens," it is void. The law is very well settled in this proposition.

Ray v. *Norseworthy*, 23 Wall, 128.

In re Crowell, 199 Fed. 661.

Cooney v. *Collins*, 176 Fed. 193.

Factors, etc., Ins. Co. v. *Murphy*, 111 U. S. 742.

A trustee takes no more or better title to the estate of the bankrupt than the bankrupt himself has, and it is only the title of the bankrupt that is placed in *custodia legis* by the adjudication in bankruptcy.

Fidelity Trust Co. v. *Gaskell*, 195 Fed. (8th Cir.).

Brandenburg on Bankruptcy, Section 1092.

Pugh v. *Loisel*, 219 Fed. 417.

In re Joseph Webre Co. (C. C. A. 5) 219 Fed. 417.

In the above case the court said:

"We think it is apparent that the bankruptcy act as a whole contemplates the taking possession and control of the bankrupt's estate by the court of bankruptcy, acting through its trustee. The property is taken into custody in the condition it is found at the time of the filing of the petition, subject to all existing valid liens upon it. The filing of the petition, of course, does not disturb such liens; but neither the existence of such liens nor attempts of the lienors to enforce them without resorting to the court of bankruptcy for that

purpose constitutes obstacles to the exercise by that court of the right to take into custody the bankrupt's estate and to control the administration of it."

Mr. Justice Sanford, while District Judge of the Eastern District of Tennessee, in the case of *In re Star Ice & Coal Company*, 252 Fed. 301, says:

"Under section 70 of the bankruptcy act the trustee is vested only with the bankrupt's title to property, hence, where the bankrupt's property is subject to a mortgage or other encumbrance, the trustee takes only the bankrupt's equity therein subject to such encumbrance, and since under section 67 of the act the validity of the pre-existing liens is not effected, the lien-holder, unless restricted by the order of the bankruptcy court, may enforce the same *dehors* the court."

Ward v. *First Nat. Bank of Ironton* (6th Cir.) 202 F. 609.

THE TEXAS BANKRUPT COURT COULD ONLY SELL THE LANDS IN QUESTION BY ANCILLARY PROCEEDINGS IN THE WESTERN DISTRICT OF ARKANSAS, AND THE MORTGAGEE HAD A RIGHT TO RESORT TO ANY COURT THAT HE COULD HAVE RESORTED TO BEFORE BANKRUPTCY.

In the case of *Skilton* v. *Codington*, a well considered case from the Court of Appeals of New York, reported in the 77 Northeastern, page 790, and which case was quoted with approval by Mr. Chief Justice

Fuller in the case of *Frank* v. *Vollkommer*, 205 U. S. 521, the opinion being by Chief Justice Cullen. The facts in that case are that a chattel mortgage was executed on October 4, 1897, by Wm. J. Barron to Skilton and his deceased partner for some $6,000. Afterwards bankruptcy intervened, and the trustee in bankruptcy, under an order of the bankrupt court, sold all of the property covered by this mortgage free of liens, reserving $2,600 for the benefit of any liens or claim that might be established on the property sold and stock of fixtures of the bankrupt. Thereupon the plaintiff brought suit in the Supreme Court to recover the amount due him on the note and mortgage and for foreclosure, and judgment was awarded for the plaintiff, and an appeal was taken by the trustee in bankruptcy to the Court of Appeals of New York, and in that case it is said:

> "The first contention of the appellant is that the State court had no jurisdiction of the cause of action, because the fund was in the possession of the bankrupt court. We think it had jurisdiction of an action to determine and establish the plaintiff's lien. It is settled by the decision of the Supreme Court of the United States in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, that the bankrupt court, except by the consent of the parties, has not jurisdiction to try and determine a suit brought by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate, or to have been transferred by him in fraud of the act, but that such suits must be prosecuted either in the State courts or in the Circuit Court of the United States, if the citi-

zenship of the parties authorizes the action to be maintained in the latter tribunal. See also *First Nat. Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051. While it is not so certain that that rule obtains its full integrity as to a suit brought against trustees in bankruptcy, we think it was the intention of the Bankrupt Act to allow adverse claimants to property or parties claiming liens to establish their rights by suits in courts of plenary jurisdiction, and not to subject such claims to summary disposition in the bankrupt court, unless it may be when the claims are frivolous or made in bad faith. In *Eyster* v. *Gaff*, 91 U. S. 521, 23 L. ed. 403, it was said: 'The opinion seems to have been quite prevalent in many quarters at one time that, the moment a man is declared a bankrupt, the district court which has so adjudged draws to itself by that act not only control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance, and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause and dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions.' This statement is quoted with approval by Judge Gray, in *Bardes*

> v. *Howarden Bank, supra.* Of course we do not mean to assert that, under the judgment of the State court, the fund or property could be taken from the possession of the bankruptcy court; the contrary is the law. It may also be that the bankrupt court could have enjoined the prosecution of this action, but it has not done so. Apparently it has permitted the plaintiff to assert his claim by a plenary suit in a court of general jurisdiction, and we may assume that the bankrupt court will give effect to any judgment recovered therein."

The appellant could only maintain suit to sell the land in controversy by either ancillary proceedings in the District Court of the United States for the Western District of Arkansas, as the lands were located in that jurisdiction, or by plenary suit, and if he sought to sell free of liens he would necessarily have to bring the mortgagee into that court by proper process, but if the mortgagee institutes proceedings in the court having jurisdiction as in this case, and the trustee enters his appearance, he is in court for all purposes, and the court of plenary jurisdiction has a right to determine the lien and render a decree of foreclosure for its satisfaction, and the consent of the bankrupt court is unnecessary, and especially is this true where the validity of the lien or mortgage is unquestioned by the trustee.

In a well considered case from the Court of Civil Appeals from the State of Texas, delivered March 1, 1902, in the case of *W. C. Belcher Land Mortgage Company* v. *Bush*, 67 Southwestern 444, in which the cases herein cited were cited, it was said:

"Where a lien against a debtor's property which is acquired more than four months before bankruptcy and which is otherwise valid is sought to be foreclosed, such foreclosure cannot, as a rule, be stayed by the Federal court. The trustee takes the property of the bankrupt subject to all valid liens, and while unsecured creditors having claims are parties to the proceeding, it must be remembered that the secured creditor as such is not a party to the bankruptcy proceedings, because if his security is valid the court has no control over him, nor can he share in the assets without surrendering his security. (Sec. 57 Bankr. Act 1898) providing for the determination of the value of the security held by secured creditors and for the payment of a dividend upon the unpaid excess of the debt over the value of the securities, would, it seems, bring a secured creditor in such case within the jurisdiction of the bankruptcy court to the extent that perhaps it might restrain proceedings to collect the lien, until the validity and value of such lien could be determined. But as presumably the determination as against an adverse claimant must be had in a State court, it would seem to be correct practice for the trustee to go by permission into that court and there obtain a stay."

Bardes v. *Bank*, 178 U. S. 524.

So far as we have been able to find, the only cases holding that the mortgagee should be brought into the bankrupt court in the jurisdiction in which he resides, is where the lien is doubtful or the amount due thereon is doubtful, and where its validity is challenged.

It is contended in this case that the trustee is in possession of the real estate sought to be foreclosed,

but it is admitted that this is wild and uncultivated timber land; his possession, at least, could only be constructive, and possibly his possession is no more than that of the possession of the mortgagee, who, under the laws of Arkansas, held the legal title.

In *Bardes, Trustee*, v. *First National Bank of Hazardville, Iowa*, 178 U. S. 524, it is said:

> "Trustees in bankruptcy appointed by the creditors of the bankrupt or by the court of bankruptcy take the place and are vested with the powers of assignees in bankruptcy under former bankrupt acts. Among the duties imposed by such trustees by section 47 are: First: Collect and reduce to money the property of the estate for which they are trustee under the direction of the court. By section 70, the trustees, upon their appointment and qualification, are vested by operation of law with the title of the bankrupt as of the date when he was adjudged a bankrupt in all his property, excepting that exempt by law from execution and liability for debts, and including property transferred by him in fraud of creditors."

> "Sec. 23. Jurisdiction of United States and State Courts. a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees, as such, and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

"c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act. 30 Stat. at L. 552, chap. 541."

Quoting from *Bardes* v. *First National Bank of Hawarden, supra*, it was further said:

"It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit at law or in equity, under the 2d section of the Act of 1867; and not by summary proceedings under the 1st section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend 'to the collection of all the assets of the bankrupt,' and 'to all acts, matters, and things to be done under and in virtue of the bankruptcy' until the close of the proceedings in bankruptcy. *Smith* v. *Mason* (1871) 14 Wall. 419, 20 L. ed. 748; *Marshall* v. *Knox* (1872) 16 Wall. 551, 557, 21 L. ed. 481, 484; *Eyster* v. *Gaff* (1875), 91 U. S. 521, 525, 23 L. ed. 403, 405.

"The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But

it was well settled that the jurisdiction of such suits, conferred by the 2d section of the Act of 1867 upon the circuit and district courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the State courts. In *Eyster* v. *Gaff*, just cited, this court, speaking by Mr. Justice Miller, said: 'The opinion seems to have been quite prevalent in many quarters at one time that, the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not devested those courts of jurisdiction of such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not devest that of the State courts.

"Under the Act of 1867, then, the distinction between proceedings in bankruptcy, properly so-called, and independent suits, at law or in equity,

between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the district courts and circuit courts of the United States by the express provision to that effect in 2 of that act, and was not derived from the other provisions of 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the circuit and district courts of the United States, did not devest or impair the jurisdiction of the State courts over like cases."

As was said by the Court of Appeals of New York, that in a proper case the trustee in bankruptcy may go into court within the jurisdiction of the lands, and, for a reasonable time and upon a proper showing, stay the proceedings of foreclosure which has been started after bankruptcy, but under the decisions herein cited, if the validity and amount of the mortgage lien is unquestioned, then the courts will refuse to stay the proceeding, and we have failed to find a single case contrary to this proposition. *W. C. Belcher Land Mortgage Company* v. *Bush, supra;* but this is the only recourse that the trustee has, and that must be by suit and injunction in a court of plenary jurisdiction.

In re Holstein Harvey Inc. (D. C.) 26 Fed. (2) 798.

But the trustee does not follow that remedy laid down for him in this suit.

In the case of *Whitney* v. *Barrett* (C. C. A. 5th) 28 Fed. (2) 760, in discussing the rights of the mortgagees and the trustee, says:

> "A plenary suit is necessary to determine the question of right of possession. *Harrison* v. *Chamberlin*, 271 U. S. 191. The plaintiff in the State court was asserting and attempting to enforce a lien obtained more than four months prior to the bankruptcy proceedings, and was entitled to proceed in the State court without interference by the bankruptcy court. The jurisdiction of the State court was not lost by the bankruptcy proceeding. *Brown Shoe Co.* v. *Wynne* (C. C. A.), 281 Fed. 807."

The facts in this case get down to the proposition that the appellee held a mortgage on the lands in question given years prior to bankruptcy. The trustee obtained no greater title to the property than the bankrupt had, which was an equity of redemption, and no more. The rights of the mortgagee to foreclose his lien long after default was made unaffected by bankruptcy. He was possessed of the legal title. The trustee does not question the validity of the amount of the mortgage lien. The bankrupt court of the Northern District of Texas was without jurisdiction to sell the property free of liens, without an ancillary proceeding in the bankrupt court in the district in which the lands were located. That course was not taken. There was no valid defense interposed to the petition of foreclosure. If there was a large equity in the lands, as contended by the trustee, and the validity of the appel-

lee's mortgage or the amount thereof had been questioned, he could, upon a proper showing, have gone into the court of ancillary jurisdiction, which was the Western District of Arkansas is in this case, and obtained a stay for a reasonable time upon a proper showing, but he has not taken that course, but has seen fit to rest solely upon the proposition that the lower court was entirely without jurisdiction to foreclose the mortgage lien of the appellee or to make such order as was necessary to carry the decree into effect.

We respectfully submit that the cause should be affirmed.

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Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 72.—October Term, 1930.

B. K. Isaacs, as Trustee in Bankruptcy of the estate of Henrietta E. Cunningham, Bankrupt, Appellant,
vs.
Hobbs Tie & Timber Company.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[February 24, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

In this cause the Circuit Court of Appeals certified the following question:

"After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale, by the trustee, of all of the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?"

This Court ordered that the entire record be sent up.

The question correctly states the issue tried in the District Court which entered the judgment from which the trustee appealed.

Henrietta E. Cunningham was adjudged bankrupt in the Northern District of Texas. The estate embraces land situate in the Western District of Arkansas. B. K. Isaacs was elected trustee. Thereafter appellee, the holder of a note secured by a mortgage on the said land, instituted foreclosure proceedings in a state court of Arkansas. It named the bankrupt and Isaacs, the trustee, as defendants, recited the bankruptcy proceeding in the Texas district, and that it had not filed its secured note as a claim therein.

The bankrupt and the trustee specially appeared and petitioned for removal of the cause to the United States District Court for the Western District of Arkansas. After removal the trustee filed an answer in which he set up, *inter alia*, his right and title as trus-

tee, his lack of information as to the execution of the note and mortgage, and the fact that the land had been scheduled in the Texas District Court as an asset of the bankrupt. He further averred that as trustee he had taken and then held peaceable possession of the land; that there was an equity in the same above the mortgage debt; that a sale in foreclosure would prejudice the rights of general creditors; that he required time for investigation as to the most favorable method of sale; that neither he nor the bankruptcy court had consented to the foreclosure of the mortgage; that the bankruptcy court had entered an order authorizing him to sell the land; that that court had exclusive jurisdiction to ascertain the facts and administer the property; that the Federal District Court in Arkansas could proceed no further than to ascertain the interests of the defendants, the validity of the mortgage lien, and the amount of the debt. The answer prayed that after these preliminary steps the court should refuse an order of sale, because of its want of jurisdiction to enter one.

On motion of the plaintiff the court struck out so much of the answer as sought to delay judgment and sale, and entered, on the pleadings, a decree of foreclosure and sale containing a proviso that if there should be any surplus of purchase-money, over the amount of the judgment, interest and costs, the same should be paid to the trustee.

Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. *Mueller* v. *Nugent*, 184 U. S. 1, 14. The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. *Robertson* v. *Howard*, 229 U. S. 254, 259-260; *Wells* v. *Sharp*, 208 Fed. 393; *Galbraith* v. *Robson-Hilliard Grocery Co.*, 216 Fed. 842. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. *Robertson* v. *Howard, supra; In re Wilka*, 131 Fed. 1004. When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. *White* v. *Schloerb*, 178 U. S. 542; *Murphy* v. *Hofman*, 211

U. S. 562; *Dayton* v. *Stanard*, 241 U. S. 588. This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. *Murphy* v. *Hofman*, *supra*; *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38; *Harkin* v. *Brundage*, 276 U. S. 36. Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation. *Ex parte City Bank of New Orleans*, 3 How. 292; *Houston* v. *City Bank of New Orleans*, 6 How. 486; *Ray* v. *Norseworthy*, 23 Wall. 128; *In re Wilka*, *supra*; *Nisbet* v. *Federal Title and Trust Co.*, 229 Fed. 644. The exercise of this function necessarily forbids interference with it by foreclosure proceedings in other courts, which save for the bankruptcy proceeding would be competent to that end. As mortgaged property ordinarily lies within the district in which the bankruptcy court sits, and the mortgagee can consequently be served with its process, the procedure usually followed is for that court to restrain the institution of foreclosure proceedings in any other.[1] Where the land lies outside the limits of the district in which the bankruptcy court sits, ancillary proceedings may be instituted in the district court of the United States for the district in which the land is, and an injunction against foreclosure issued by the court of ancillary jurisdiction. *In re Patterson Lumber Company*, 228 Fed. 916; 247 Fed. 578. Compare *Security Mortgage Co.* v. *Powers*, 278 U. S. 149. Such injunctions are granted solely for the reason that the court in which foreclosure proceedings are instituted is without jurisdiction, after adjudication of bankruptcy, to deal with the land or liens upon it save by consent of the bankruptcy court. The appel-

[1] *In re Pittelkow*, 92 Fed. 901. *In re Dana*, 167 Fed. 529. *In re Brown*, 196 Fed. 758. *Pugh* v. *Loisel*, 219 Fed. 417; certiorari denied, 238 U. S. 631. *Karasik* v. *People's Trust Co.*, 241 Fed. 939. *In re Larkin*, 252 Fed. 885. *In re Locust Building Co.*, 272 Fed. 988. *First Trust Co.* v. *Baylor*, 1 Fed. (2d) 24. *In re Southern Florida Corporation*, 61 Fed. (2d) 171. *In re Gillette*, 18 Fed. (2d) 687.

lant-trustee might have instituted ancillary proceedings in the District Court for the Western District of Arkansas and there obtained an injunction to restrain the appellee from foreclosing its mortgage. There is no reason, however, why he should not have followed the course here pursued, of pleading the adjudication in Texas in abatement of the foreclosure proceeding. The state court in which the foreclosure action was begun was without jurisdiction to pursue it. Upon removal into the federal court upon the ground of diversity of citizenship, the latter court had no higher or different right to interfere with the bankruptcy administration than had the state court. The answer of the trustee stated a valid defence and it was error to enter judgment against him on the pleadings.

Appellee asserts that inasmuch as the appellant removed the cause into the Federal Court he waived any lack of jurisdiction in that court and estopped himself to set up exclusive jurisdiction of the bankruptcy court. There is no merit in this contention. The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the power of the court's officers to oust it by surrender of property which has come into its possession. *Whitney* v. *Wenman*, 198 U. S. 539; *In re Schermerhorn*, 145 Fed. 341. Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate. *U. S. F. & G. Co.* v. *Bray*, 225 U. S. 205. The action of the trustee in removing the cause, could not, therefore, divest the Texas District Court of its jurisdiction.

The judgment of the District Court must be reversed and the cause remanded to that court, for further proceedings in conformity with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.